Supreme Court, U.S.
FILED

061380 APR 18 2007

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No.

In the Supreme Court of the United States

ESTATE OF ELLA M. PARKER,

Petitioner,

v.

SEDONA GOLF RESORT, L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES HULTSTRAND
Charles Hultstrand P.C.
1811 S. Alma School Road, Suite 245
Mesa, AZ 85201
(480) 222-0009

MICHAEL S. PAISNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The doctrine of judicial estoppel is designed "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire* v. *Maine*, 532 U.S. 742, 749–750 (2001) (internal quotation marks and citations omitted). In *New Hampshire*, the Court noted that the factors informing the decision whether to apply the doctrine in a specific case include (i) a clear inconsistency between a party's earlier and later positions; (ii) judicial acceptance of the prior position; and (iii) either an unfair advantage to the party asserting the inconsistent position or an unfair detriment to the adverse party. *Id.* at 750–751.

The question presented, on which there is a conflict among the circuits, is whether judicial estoppel is *per se* unavailable when there has been judicial acceptance of a party's prior position in a final decision on the merits, but that decision thereafter was reversed on appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Estate of Ella M. Parker, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the court of appeals affirming the order of the district court (App., *infra*, 1a–4a) is reported at 204 F. App'x 598 (9th Cir. 2006). The September 8, 2004 order of the district court affirming the bankruptcy court's decision (App., *infra*, 5a–15a) is unreported. The August 22, 2003 decision of the bankruptcy court (*id.* at 16a–40a) is unreported. Other relevant orders in this case include the November 30, 1998 decision of the bankruptcy court (*id.* at 41a-56a), the May 29, 1998 decision of the district court (*id.* at 57a–59a), the May 21, 1998 decision of the Arizona Supreme Court (*id.* at 60a–61a), on certification from the district court (*id.* at 62a-65a), and the January 3, 1996 decision of the bankruptcy court (*id.* at 66a–79a), all of which are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 2006. A petition for rehearing was denied on December 18, 2006. See App., *infra*, 80a. On March 6, 2007, Justice Kennedy extended the time to petition for certiorari to and including April 18, 2007 (No. 06A852). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case presents a clear circuit split on an important issue of when judicial estoppel may apply to bar a later, inconsistent argument. See *New Hampshire* v. *Maine*, 532 U.S. 742, 750–751 (2001). Under *New Hampshire*, the factors informing the judicial-estoppel analysis include whether there is (i) a clear inconsistency between a party's earlier and later

positions, (ii) judicial acceptance of the prior position, and (iii) either an unfair advantage to the party asserting the inconsistent position or an unfair detriment to the adverse party. *Id.* at 750–751; see also *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895). In this litigation, the Ninth Circuit held that there has been no "judicial acceptance" of an argument—and that, as a result, judicial estoppel *per se* cannot apply—when the prior argument *was* in fact accepted by a court in granting final judgment, but that judgment was later reversed on appeal. The Ninth Circuit's *per se* rule, which has also been adopted by the Sixth Circuit, see *Coal Res., Inc.* v. *Gulf & W. Indus., Inc.*, 865 F.2d 761, 773 (6th Cir. 1989), is in direct conflict with the rule adopted by the Seventh Circuit, which allows for a finding of "judicial acceptance"—and therefore permits application of judicial estoppel—even if the judgment accepting the prior inconsistent argument was thereafter reversed on appeal. See *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004) (Posner, *J.*); see also *Stallings* v. *Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006) (adopting rule similar to *Carnegie* in the bankruptcy context).

The Ninth Circuit's approach to judicial estoppel not only exacerbates a clear circuit conflict, it is also plainly wrong. Limiting judicial estoppel in this way is fundamentally at odds with the purpose of the doctrine: protecting "the integrity of the judicial process," broadly defined. See *New Hampshire,* 532 U.S. at 749–750 (internal quotation marks and citations omitted). The reversal of a judgment on appeal does little to mitigate the harm done to judicial integrity when a party convinces a court to adopt one position and then subsequently argues the diametrically opposed position. And a rule that subsequent reversal always allows a party to perform an about-face and change its position creates incentives to engage in litigation fraud. Reversal might, in appropriate instances, counsel against applying judicial estoppel, but the Ninth Circuit's adoption of an "inflexible prerequi-

site[]," *Id.* at 751, disserves the broader equitable purposes that underlie the doctrine.

Thus, review in this Court is warranted to address the growing divergence in the approaches adopted by the courts of appeals to defining the "judicial acceptance" standard and to preserve judicial estoppel as an equitable doctrine capable of protecting the integrity of the judicial process.

A. Factual Background

The facts and procedural history of this case—which was first filed in 1992—are extremely complex, although the legal question presented in this petition is not. A summary of the only relevant facts for the purposes of this petition is as follows: Respondent initially argued that a piece of property was included in a deed by *mutual* mistake; the bankruptcy court granted summary judgment in its favor, adopting respondent's "mutual mistake" argument in the process. That decision was reversed by the district court, which rejected the legal theory on which the judgment in favor of respondent was based. Thereafter, respondent—instead of continuing to adhere to its theory of mutual mistake—argued that the inclusion of the property in the deed was at most a *unilateral* mistake by petitioner's predecessor-in-interest. The bankruptcy court rejected petitioner's judicial estoppel argument and, after a trial, again granted judgment to respondent, this time based on a finding that there had indeed been a unilateral mistake. The district court and, in turn, the Ninth Circuit affirmed. In so doing, the Ninth Circuit agreed that judicial estoppel was inappropriate because, even though the bankruptcy court had originally *accepted* respondent's mutual-mistake argument, that decision was thereafter reversed by the district court on appeal.

A more extensive recitation of the facts follows: The case arises from a dispute over ownership of a small but well-situated stretch of road (the "Road") in Sedona, Arizona. The Road connects Arizona's State Route 179—the main road from Interstate 17 to the rapidly growing Sedona

region—to a master planned development consisting of a golf course and surrounding residential and commercial areas (the "Development"). App., *infra*, 16a-17a. The Development is owned by the respondent in this case, Sedona Golf Resort, L.C. *Id.* at 16a.

The origins of the dispute extend back to 1982, when the Development had yet to be constructed. At that time, the Ridge at Sedona, Inc. ("The Ridge") was incorporated by a group of investors—including Ken Parker, the majority shareholder and president, and Joseph and Sonny Rodriguez ("the Rodriguezes")—with the purpose of constructing a subdivision of condominiums on the site currently occupied by the Development. App., *infra*, 24a, 42a, 68a. Shortly after the Ridge was incorporated, it acquired title to the Road, which was (and still is) the primary access from State Route 179 to the area of the planned subdivision. *Id.* at 42a, 68a.

In June 1983, the Ridge entered into a trust agreement pursuant to which it conveyed certain interests in land to a trustee for the purposes of developing the planned subdivision. App., *infra*, 24a-25a, 42a-43a, 68a-69a. The land was conveyed via an original and an amended warranty deed, which incorporated specific parcels of land by reference to a "declaration of plat" and a subsequent amendment to that declaration (together, the "plat"). *Id.* at 18a-19a, 42a-43a, 68a-70a. The plat contained a map of the Road and certain ambiguous language, which arguably could be interpreted to effect, through the trustee, a private dedication of the Road to an entity called the Ridge at Sedona Association of Homeowners, Inc. ("HOA"). *Id.* at 18a-19a, 42a-43a, 69a-70a, 74a-79a.

In October 1985, subsequent to the dubious dedication of the Road to the HOA, Ken Parker executed, on behalf of the Ridge, a deed of trust in favor of the Rodriguezes (the "Rodriguez deed of trust") in order to secure a loan. App., *infra*, 26a, 73a-74a. The Road was included in the legal description of the property subject to the Rodriguez deed of trust. *Id.* at

26a, 73a. Petitioner and its predecessors-in-interest consistently have maintained throughout the course of this litigation that the inclusion of the Road in the description of the properties subject to the Rodriguez deed of trust was a mutual mistake and that the deed therefore was invalid insofar as it included the Road.[1] *Id.* at 6a, 21a, 73a. This position is supported by the trial testimony of Ken Parker. *Id.* at 38a.

The Ridge's corporate charter was revoked in April 1990. App., *infra*, 6a, 25a-26a. In 1992, the Rodriguez deed of trust was foreclosed, and the Rodriguezes purported to take title to the Road, subsequently deeding it to respondent's predecessor-in-interest. *Id.* at 21a, 26a, 35a. Separately, the HOA also ostensibly acquired title to the Road from the trustee by virtue of a June 1994 default judgment; the HOA conveyed any interest it had in the Road to respondent in early 1995. *Id.* at 47a, 70a, 73a.

B. Proceedings Below

The underlying adversary proceeding in this case was brought in 1992 by respondent and the HOA (the "plaintiffs") in four consolidated bankruptcy cases alleging claims against 35 named defendants. App., *infra*, 17a. The plaintiffs' complaint as amended alleged an action by respondent to quiet title in the Road against Port and Ella Parker, the parents of Ken Parker. *Id.* at 18a, 66a.[2] Port and Ella Parker

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[1] "A mutual *mistake* exists where there has been a meeting of the minds of the parties, and an agreement is actually entered into, but the agreement in its written form does not express what was really intended by the parties." *Hill-Shafer P'ship* v. *Chilson Family Trust*, 799 P.2d 810, 814 (Ariz. 1990).

[2] Although the adversary proceeding alleged a number of claims against a number of defendants, all claims and defendants were ultimately dismissed save for respondent's quiet title action against Port and Ella Parker, who are now deceased. App., *infra*, 7a n.1, 17a-18a, 66a. During the course of this litigation, respondent—through its predecessor-in-interest—obtained the interests in the

claimed title to the Road based both on an agreement with the Rodriguezes to hold the Road in trust for the shareholders of the Ridge and on their acquisition of Ken Parker's interest in the assets of the Ridge in 1991, after its dissolution. *Id.* at 46a, 78a. Port and Ella Parker are the predecessors-in-interest of petitioner for the purposes of this litigation, and will hereinafter be referred to as petitioner.

In late 1995, the parties filed cross-motions for summary judgment on the quiet title action. App., *infra*, 67a. The primary theory advanced by respondent in its cross-motion was that the 1983 deed of trust effected a private dedication of the Road to the HOA and that respondent thus owned the Road as successor-in-interest to the HOA. *Id.* at 18a & n.5. In its filings, respondent repeatedly argued—in agreement with the position espoused by petitioner—that the inclusion of the Road in the Rodriguez deed of trust had been a mutual mistake.[3]

The bankruptcy court granted summary judgment to respondent, holding, on the basis of respondent's private-plat-dedication theory, that the Ridge had deeded the Road to the trustee for the benefit of the HOA. App., *infra*, 74a-79a. In its

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Road possessed by the HOA and all of the defendants except for Port and Ella Parker. *Id.* at 18a n.5; 73a.

[3] See, *e.g.*, Cross Motion for Summ. Judgment re: Entrance Road filed by Plaintiff at 22, *Sedona Golf Resort, L.C. v. Parker (In Re Parker)*, No. B-92-5793 (Bankr. D. Ariz. Jan. 3, 1996) ("It is undisputed that the legal description attached to the Rodriguez 9/23/95 Deed of Trust was erroneous, and was a mutual mistake."); *id.* at 15 ("It is undisputed that the Rodriguez 9/23/85 Deed of Trust had a mutually mistaken legal description attached to it."); see generally *id.* at 15-26. Respondent's attorney reasserted the mutual mistake argument to the bankruptcy court at an October 26, 1995 hearing on the cross-motions, responding "absolutely" to the court's question as to whether the Rodriguez trust "covers property that all parties agree is a [mutual] mistake." Transcript of Hearing at 55–56, *In Re Parker*, No. B-92-5793.

order, the bankruptcy court specifically found that "[a]ll parties agree that the inclusion of the [Road] on the [Rodriguez] deed of trust was a mutual mistake." *Id.* at 73a.

Petitioner appealed to the district court, which certified the question whether private roadways could be dedicated by plat under Arizona common law to the Arizona Supreme Court. App., *infra*, 62a-65a. The Arizona Supreme Court responded in the negative, and, because that ruling nullified the basis for the bankruptcy court's grant of summary judgment to respondent, the district court thereafter reversed and remanded the case for further proceedings. *Id.* at 60a-61a.

In August 2003, after a trial, the bankruptcy court issued a decision quieting title to the Road in respondent. App., *infra*, 16a-40a. The court reasoned that county records showed title to the Road in respondent through the deed from the Rodriguez parents and that petitioner had failed to overcome the presumption that record title is correct. *Id.* at 35a-39a. In particular, the court found that petitioner had not rebutted the presumption that the Rodriguez deed of trust was valid and included the Road. *Ibid.* The court rejected petitioner's argument that, as a result of respondent's prior advancement of the argument that the inclusion of the Road in the Rodriguez deed of trust had been a mutual mistake—and the bankruptcy court's acceptance of that argument in its summary judgment order—respondent should be judicially estopped from arguing the contrary position. *Id.* at 35a–36a. The court then found that "the evidence at best suggests a unilateral mistake by [the Ridge]." *Id.* at 39a.

In affirming the bankruptcy court's order, the district court stated that it "does not find that the Bankruptcy Court erred when it determined that there was not clear and convincing evidence of a mutual mistake between [the Ridge] and the [Rodriguezes]." App., *infra*, 13a. Although the court specifically noted that petitioner had argued judicial estoppel, *id.* at 11a-12a, the court failed to address that argument, *id.* at 10a–13a.

The Ninth Circuit affirmed. With respect to petitioner's judicial estoppel argument, the court held that "[i]t was * * * not an abuse of discretion for the bankruptcy court to allow [respondent] to pursue a theory of ownership based on record title after its initial private plat dedication theory failed." App., *infra*, 3a. According to the Ninth Circuit, "[w]hen a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no 'risk of inconsistent court determinations.'" *Ibid.* (quoting *New Edge Network, Inc.* v. *F.C.C.*, 461 F.3d 1105, 1114 (9th Cir. 2006)). Furthermore, according to the Ninth Circuit, "[respondent] gained no unfair advantage from [initially] advancing the position that the Rodriguez trust resulted from mutual mistake * * * *because*" the initial grant of summary judgment was reversed. *Ibid.* (emphasis added; citation omitted).[4] Thus, the Ninth Circuit plainly held that there is no "judicial acceptance" of a position, and as a result can be no judicial estoppel, if the decision in which a court accepts the party's prior inconsistent position is reversed on appeal.

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[4] Here, the court apparently conflated two of the factors identified in *New Hampshire*—judicial acceptance of the prior position and an unfair advantage to the party asserting the inconsistent position. See 532 U.S. at 751. But, as the separate enumeration of the factors in *New Hampshire* implicitly recognizes, the fact that there was reversal of the prior judicial acceptance of respondent's litigating position is unrelated to whether respondent realized an unfair advantage (or, more precisely, imposed an unfair detriment on petitioner) in the litigation as a result of the switch in position. See pages 17–19, *infra*.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Of Appeals Are Sharply Split Over Whether A Judgment That Has Been Reversed On Appeal Can Satisfy The "Judicial Acceptance" Factor And Thus Serve As A Basis For Judicial Estoppel.

There is a clear conflict among the courts of appeals over whether judicial estoppel may apply when there has been "judicial acceptance" of a litigant's initial position, but the judgment incorporating that judicial acceptance has thereafter been reversed on appeal.

In addition to the Ninth Circuit, the Sixth Circuit has held that a judgment that has been reversed on appeal may not serve as a basis for judicial estoppel of a subsequent inconsistent argument. In *Coal Resources*, the plaintiff prevailed at trial, but the judgment was reversed on appeal. See 865 F.2d at 765. After remand, plaintiff again won a jury verdict, based in part on its expert taking a position that was inconsistent with the position it had asserted in the first trial. The Sixth Circuit rejected the defendant's judicial estoppel argument, holding that judicial estoppel only applies when a "party *successfully* asserts a position," *id.* at 773 (emphasis added), and that the plaintiff had not been "successful in the prior trial" because the verdict in its favor was "reversed on appeal." *Ibid.* The fact that the prior judgment had been reversed meant that there was "no risk of inconsistent results" and no "perception [present] that either the first or the second court" had been "misled." *Ibid.* (quoting *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)). Therefore, "the integrity of the judicial process [was] unaffected" by the plaintiff's switch in position. *Ibid.* (quoting *Edwards*, 690 F.2d at 598).

The Seventh Circuit has held directly to the contrary. In *Carnegie*, that court ruled that defendants in a class action, who successfully had convinced a district court to approve a global settlement that was thereafter rejected on appeal, were

judicially estopped from challenging the adequacy of the plaintiff class (at least for the purposes of settlement) in a subsequent certification proceeding. See 376 F.3d at 659–660 (citing *New Hampshire*, 532 U.S. 742). Writing for the court, Judge Posner specifically noted that judicial estoppel applies despite the reversal of the initial settlement on appeal: "[R]eversal need not affect the application of judicial estoppel." *Id.* at 660.

The Eighth Circuit's decision in *Stallings* v. *Hussmann Corp.* follows a similar approach to that taken by the Seventh Circuit in *Carnegie*. *Stallings* held that a bankruptcy court's original discharge of a debt—when based on information provided by the debtor—constitutes sufficient acceptance of the debtor's position to provide a basis for judicial estoppel, even if the bankruptcy court "thereafter vacates and dismisses the debtor's bankruptcy after learning that the debtor was concealing claims." 447 F.3d at 1048 (citation omitted).

The reasoning of these other courts—and in particular Judge Posner's careful exposition in *Carnegie*—contrasts sharply with that of the Sixth and Ninth Circuits. The only facts that the *Carnegie* court deemed relevant to whether there had been judicial acceptance of the prior position were that the defendants (i) "had urged the district court to accept the giant class as appropriate for a global settlement" and (ii) "had prevailed in their urging." *Carnegie*, 376 F.3d at 659-660 (citing *New Hampshire*, 532 U.S. 742). According to the Seventh Circuit, applying judicial estoppel despite the intervening reversal on appeal furthers "the purpose of the doctrine," which is to protect "'the integrity of the judicial process.'" *Carnegie*, 376 F.3d at 660 (quoting *New Hampshire*, 532 U.S. at 749–750). As Judge Posner noted, the core practical concern is the reduction of "fraud in the legal process by forcing a modicum of consistency on a repeating litigant" (*ibid.*). This "antifraud policy is fully engaged"—and, thus, "the integrity of the judicial process" is at risk—"when a party obtains a judgment on a ground that it later repudiates,

even if his opponent, the loser in that first case, is able, obviously at some expense to itself but also placing a demand on judicial resources, to get the judgment reversed." *Ibid.*[5]

The approach adopted by the Sixth and Ninth Circuits interprets the "judicial acceptance" factor narrowly: a judgment that has been reversed on appeal cannot, as a matter of law, present the risk of inconsistent results or the perception that a court had been misled (*i.e.*, threaten judicial integrity), and thus cannot serve as the basis for a finding of "judicial acceptance." See *Coal Res.*, 865 F.2d at 773; App., *infra*, 3a. Such an approach rigidly limits the circumstances in which judicial estoppel is applicable. On the other hand, the approach taken by the Seventh Circuit in *Carnegie* (and, implicitly, by the Eighth Circuit in *Stallings*), interprets the "judicial acceptance" factor broadly—it can be met by the mere fact that a court reached a judgment based on a litigant's argument, regardless of subsequent developments—and thus affords courts more flexibility to protect judicial integrity when it is threatened. These conflicting approaches to an important and recurring question affecting litigation in the federal courts warrant this Court's review.

Indeed, the Court's resolution of the issue presented in this petition would provide the lower courts with guidance that might resolve closely related conflicts as to what qualifies as "judicial acceptance" of an argument for purposes of judicial estoppel. These related circuit splits include (i) whether entry into a settlement satisfies the "judicial acceptance" factor, compare *Bates* v. *Long Island R.R. Co.*, 997

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[5] The *Carnegie* court buttressed this holding by observing that the defendants in the case had benefited from the temporary approval of the settlement (prior to its reversal) because they had successfully sought to enjoin other related litigation against them. 376 F.3d at 660. "[H]aving reaped a benefit from their pertinacious defense of the class treatment of the case for purposes of settlement[, defendants] cannot now be permitted to seek a further benefit from reversing their position." *Ibid.*

F.2d 1028, 1038 (2d Cir. 1993), *Edwards*, 690 F.2d at 599, and *Exxon Corp.* v. *Oxxford Clothes, Inc.*, 109 F.3d 1070, 1077 n.9 (5th Cir. 1997), with *Commonwealth Ins. Co.* v. *Titan Tire Corp.*, 398 F.3d 879, 887 (7th Cir. 2004), and *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604–605 (9th Cir. 1996); and (ii) whether judicial estoppel should apply to inconsistent arguments asserted over the course of a single litigation, compare *Alternative Sys. Concepts, Inc.* v. *Synopsys, Inc.*, 374 F.3d 23, 34-35 (1st Cir. 2004), *Wagner* v. *Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1044–1050 (9th Cir. 2004), and *San Carlos Irrigation & Drainage Dist.* v. *U.S.*, 111 F.3d 1557, 1568 (Fed. Cir. 1997), with *Emergency One, Inc.* v. *Am. Fire Eagle Engine Co.*, 332 F.3d 264, 273 (4th Cir. 2003), *United States* v. *Newell*, 239 F.3d 917, 921 (7th Cir. 2001), and *Adler* v. *Pataki*, 185 F.3d 35, 41 n.3 (2d Cir. 1999).

II. The Decision Below Is Clearly Incorrect And Reflects A Conception Of The Purposes Of The "Judicial Acceptance" Requirement That Undervalues The Importance Of Protecting The Integrity Of The Judicial Process.

The Ninth Circuit's decision in this case not only exacerbates an important circuit split; it is also plainly incorrect.

A. *New Hampshire* suggests that courts should adopt a broad approach to defining "judicial acceptance."

This Court recognized in *New Hampshire* that judicial estoppel serves the purpose of protecting "the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." 532 U.S. at 749–750 (quoting *Edwards*, 690 F.2d at 598; *United States* v. *McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). The *New Hampshire* Court also strongly implied that the concern with judicial integrity should be interpreted broadly and remedially, citing to perhaps the three cases—among the dozens in which the circuits have addressed judi-

cial estoppel issues—that sweep most widely in their articulation of the purposes of the doctrine. See 532 U.S. at 749–750 (citing *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *Scarano* v. *Cent. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). These cases suggest that an argument potentially threatens judicial integrity any time that it appears unseemly in light of judicial adoption of a prior inconsistent argument.[6] A leading treatise describes this as the most "open-ended approach" to judicial estoppel, "seeking to prevent a party from playing fast and loose with the courts" and thus implying "distinctions between seemly and unseemly adversary behavior." 18B C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477, at 550 (2d ed. 2002); see also *id.* § 4477, at 577–578.

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[6] See *In re Cassidy*, 892 F.2d at 641 (observing that party's "maneuverings were clearly intended to delay the inevitable day of reckoning" and holding that such attempt "to whipsaw this court * * * is exactly the evil that the doctrine of judicial estoppel was meant to avoid"); *Allen*, 667 F.2d at 1166 (observing that "[j]udicial estoppel is invoked," *inter alia*, "to prevent the party from playing fast and loose with the courts," and "to prevent the use of intentional self-contradiction * * * as a means of obtaining unfair advantage in a forum provided for suitors seeking justice") (internal quotation marks and citations omitted); *Scarano*, 203 F.2d at 513 ("A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing fast and loose with the courts which has been emphasized as an evil the courts should not tolerate.") (internal quotation marks omitted).

B. The Ninth Circuit's approach to judicial estoppel in this case is inconsistent with the purposes underlying judicial estoppel, and in particular with protecting the integrity of the judicial process.

In light of the broad, open-ended approach to judicial estoppel favored by this Court, and the purposes underlying that doctrine, the rule adopted by the Ninth Circuit in this case is plainly wrong.

The Ninth Circuit's opinion is notably lacking in analysis. That court held that reversal eliminated the "risk of inconsistent court determinations," App., *infra*, 3a, and that, as a result of the reversal, respondent "gained no unfair advantage" in the litigation, *ibid.* (internal quotation marks omitted). But the former assertion is simply incorrect; the bankruptcy court in this case *itself* reached two inconsistent determinations, thus "pos[ing a] threat to judicial integrity." *New Hampshire*, 532 U.S. at 751; *Carnegie*, 376 F.3d at 659. And the latter assertion conflates two separate factors relevant to whether to apply the doctrine—judicial acceptance and giving a party an unfair advantage. See *New Hampshire*, 532 U.S. at 750–751; see also pages 17-19, *infra* (demonstrating that respondent obtained an unfair advantage in this case by switching its position). The Sixth Circuit's decision in *Coal Resources* also lacks any clear theoretical underpinning.

Had these courts looked to the reasons why the judicial estoppel doctrine exists, they would have realized that the mere fact of reversal on appeal is not determinative.

The judicial estoppel doctrine exists to serve the interests of the *judicial system* and is not concerned with the interests of the parties. See *Superior Crewboats, Inc.* v. *Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir. 2004); *Lowery* v. *Stovall*, 92 F.3d 219, 223 n.3 (4th Cir. 1996); *Ryan Operations G.P.* v. *Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996); *Teledyne Indus., Inc.* v. *N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990);

In re Cassidy, 892 F.2d at 641. It is a "prophylactic" doctrine that serves to protect judicial integrity. *Alternative Sys. Concepts*, 374 F.3d at 33.

The powerful systemic interest in defending the integrity of the court system and preserving the efficacy of judicial institutions commands robust rules to preclude deliberate misconduct. See *Patriot Cinemas* v. *Gen. Cinemas Corp.*, 834 F.2d 208, 214 (1st Cir. 1987) ("An effective legal system depends upon norms of candor and responsibility."); cf. *Alternative Sys. Concepts*, 374 F.3d at 32 (observing that federal court has "powerful institutional interest in applying federally-developed principles to protect itself against cynical manipulations"); *Rissetto*, 94 F.3d at 604 (noting that preservation of integrity of the judicial process is a "quite strong" consideration).

The fact that a prior judicial determination lacks continuing legal force has little bearing on whether the court, in making that determination, put sufficient credibility on the line such that a subsequent inconsistent argument threatens its integrity. Nor does that lack of continuing legal significance affect the additional purpose underlying judicial estoppel of reducing the incentives for litigants to engage in fraud in an effort to sustain inconsistent arguments. See *Chaveriat* v. *Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993) ("[J]udicial estoppel raises the cost of lying."). Addressing these concerns requires a flexible approach, not one hemmed in by *per se* rules that are divorced from the doctrine's underlying rationales. See *In re Cassidy*, 892 F.2d at 642 ("[I]t may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts.").

When a court accepts a party's argument in some formal fashion, the court signals that the argument has become associated with, and gains credibility from, the institution of the judiciary itself. At that moment, the cost if a litigant thereafter "mislead[s]," *Lowery*, 92 F.3d at 225, or "hoodwink[s],"

Kale v. *Obuchowski*, 985 F.2d 360, 361-362 (7th Cir. 1993), the court through a future inconsistent argument becomes real and significant, and must be guarded against.

Moreover—as the Seventh Circuit recognized in *Carnegie*—the prospect that inconsistent arguments will be based on fraud or perjury must concern the judicial system once a court has accepted the prior argument. 376 F.3d at 660. Of course, the federal rules recognize that inconsistency may sometimes reflect legitimate uncertainty, not dishonesty; at early stages of a litigation, this consideration trumps any concern that inconsistency threatens judicial integrity. See Fed. R. Civ. P. 8(e)(2); 5 C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1283, at 726 (3d ed. 2004). But, as the *Carnegie* court implied, at later stages of a litigation—and particularly once a judgment has been reached—the prospect that inconsistency is the product of legitimate uncertainty is minimal and is trumped by the greatly augmented threat to judicial integrity. See *Carnegie*, 376 F.3d at 659.[7] Courts are well equipped to evaluate the counterbalancing considerations in individual cases, cf. *Desjardins* v. *Van Buren Cmty. Hosp.*, 37 F.3d 21, 23 (1st Cir. 1994), and should be left free to do so.[8]

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[7] See also *Chaveriat*, 11 F.3d at 1428 (noting that, under rules of alternative pleading, "party does not have to make a binding election of positions until the first suit goes to judgment," beyond which point "he is forbidden to equivocate"); *Lowery*, 92 F.3d at 224 (application of judicial estoppel warranted where "the necessity of protecting judicial integrity outweighs the ramifications of that protection upon the litigant and the judicial system"); cf. *Allen*, 667 F.2d at 1167 (noting that rule permitting inconsistent claims or pleadings is justified only if result will be an "internally consistent final decision").

[8] The fact that judicial estoppel exists to serve the interests of the judicial system explains why the appropriate rule here differs from that in the issue-preclusion context, where a reversed or vacated judgment is denied preclusive effect. See *Dep't of Soc. Servs.* v.

C. The facts of this case clearly warrant the application of judicial estoppel and demonstrate the wisdom of a broad approach to the doctrine.

This case demonstrates the wisdom of the broad, flexible approach to judicial estoppel adopted in *Carnegie*, and the problems inherent in the narrow and inflexible approach adopted here by the Ninth Circuit. Whatever the general merits of allowing parties to assert inconsistent arguments, there is no reason to permit such inconsistency in this case.

There is no question that respondent initially advanced the argument that the Rodriguez deed of trust had resulted from mutual mistake simply because that position redounded to its strategic litigation advantage. Petitioner has maintained throughout this litigation—including in its initial cross-motion for summary judgment in 1995—that the Rodriguezes, recognizing that the inclusion of the Road in the deed of trust had been a mutual mistake, agreed to hold the Road in trust for the petitioner. See App., *infra*, 21a. Concerned about

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Thompson, 321 F.3d 835, 847 (9th Cir. 2003); *Simpson* v. *Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir. 1974). As the majority of circuits have recognized, judicial estoppel and issue preclusion are distinct. See *Telcdyne*, 911 F.2d at 1219; *Scarano*, 203 F.2d at 512; cf. *Konstantinidis* v. *Chen*, 626 F.2d 933, 937 n.6 (D.C. Cir. 1980); 18B C. WRIGHT ET AL., *supra*, § 4477, at 551 ("[J]udicial estoppel has little to do with preclusion by judgment, even when it requires reliance by a court on a prior inconsistent position."). Issue preclusion serves, in large part, the interests of the parties. See *Freeman United Coal Mining Co.* v. *Office of Workers' Comp. Program*, 20 F.3d 289, 294 (7th Cir. 1994); see also *Edwards*, 690 F.2d at 598; Restatement (Second) of Judgments § 27 cmt. e. Because a judgment that has been reversed or vacated on appeal thereby becomes "null and void," and "the parties" are left "in the same situation as if no trial had ever taken place in the cause," *United States* v. *Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869); see also *United States* v. *Lawson*, 736 F.2d 835, 837 (2d Cir. 1984), there is insufficient basis for the application of preclusion.

the legal implications if the court accepted this trust argument, respondent sought to attack the validity of the Rodriguez deed of trust on a number of grounds, including by arguing that the inclusion of the Road had been a mutual mistake. See page 6 n.3, *supra*. Thus, respondent initially based its claims on the private plat dedication theory, and argued the facts accordingly. See App., *infra*, 18a ("Private plat dedication was [respondent's] primary theory to quiet title to [the Road]").

It was only when subsequent legal developments rendered the private plat theory untenable—and the only viable legal argument that remained for respondent was one premised on the *validity* of the deed of trust—that respondent reversed course. Such an about face neither demonstrates a bona fide effort to grapple with factual uncertainty nor advances the search for truth. Rather, it exemplifies the type of cynical disregard for, and manipulation of, the judicial fact-finding process against which judicial estoppel is meant to protect. See *Davis*, 156 U.S. at 689 (party may not "assume a contrary position" "simply because his interests have changed").

Thus, respondent's attempt to reverse course midstream in this case should have been rejected based on each of the *New Hampshire* factors: There is no question that respondent's positions were inconsistent and that the bankruptcy court accepted respondent's prior position in the summary judgment order. Nor can there be any doubt that respondent's switch in position was seriously detrimental to petitioner. Since at least the date of the filing of respondent's cross-motion for summary judgment in October 1995, respondent's consistent and unambiguous representations gave petitioner the distinct impression that the invalidity of the Rodriguez deed of trust—which has turned out to be the crucial issue in this case—was not in dispute.

Proving the existence of a mutual mistake is a fact-intensive endeavor. As a result of respondent's manipula-

tions, petitioner conducted discovery in this case under the erroneous assumption that there was no need to seek to obtain evidence relevant to the question of mutual mistake.[9] Most saliently, petitioner could have sought to obtain testimony from the Rodriguezes as to the invalidity of the legal description of the deed of trust.[10] Or, petitioner could have sought out evidence demonstrating that the Rodriguezes "possessed knowledge of the mistake" and took "unfair advantage of the error," thus justifying invalidation of the deed of trust based on unilateral error per the standard enumerated by the bankruptcy court. See App., *infra*, at 39a; see also *Parrish* v. *United Bank*, 790 P.2d 304, 306 (Ariz. Ct. App. 1990); *Crosby* v. *Andrews*, 55 So. 57 (Fla. 1911). Finally, Port Parker had died by the time of the 2003 trial, and, as a result, was not available to testify.

Thus, as petitioner argued below (see Appellant's Br. 29), there clearly were a number of grounds for finding that respondent's change of position created substantial prejudice in this instance. But the Ninth Circuit's rigid rule precluded any consideration of these relevant factors. See *Carnegie*, 376 F.3d at 659.

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[9] Cf. *Alternative Sys. Concepts*, 374 F.3d at 34 ("Relying on ASC's prior representation, Synopsys conducted discovery under the warranted assumption that it faced a charge of failing to negotiate in good faith as called for by the LOU. The factual predicate and legal elements of that charge are materially different from the factual predicate and legal elements of the charge that ASC attempted to advance at summary judgment. The unfairness [of such a 'sneak attack'] is apparent.").

[10] The bankruptcy court specifically noted the absence of such testimony. See App. *infra*, 38a-39a.

III. The Fact That Judicial Estoppel Is A Discretionary Equitable Doctrine In No Way Lessens The Need For This Court's Further Guidance As To Its Appropriate Scope.

Although this Court has articulated three factors that should inform the judicial estoppel analysis, it has expressly declined to establish these factors as "inflexible prerequisites" or an "exhaustive formula." *New Hampshire*, 532 U.S. at 751. This circumspection bespeaks the Court's awareness that the doctrine is "equitable" and "invoked by a court at its discretion." *Id.* at 750.

But it is precisely because courts exercise such wide discretion in applying judicial estoppel that this Court must ensure that the lower courts properly interpret and adhere to the guidance that *has* been provided. The judicial estoppel analysis, while in a court's discretion, is not free-form; as the courts of appeals themselves have recognized, the factors enumerated by this Court's decisions establish parameters that must be interpreted properly and obeyed.[11]

Discretion is abused where a court bases a ruling "on an erroneous view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The Ninth Circuit's interpretation of the "judicial acceptance" requirement so as to exclude all representations made in cases that are reversed on appeal constitutes just such an erroneous view of the law—and one that only this Court can correct.

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[11] For example, the Third Circuit, which traditionally had treated the "judicial acceptance" factor as a discretionary consideration in deciding whether to apply estoppel, see *Ryan*, 81 F.3d at 361, has—in light of this Court's intervening precedents—joined the vast majority of the circuits in recognizing that "judicial acceptance" is a prerequisite. See, *e.g.*, *Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 782 (3d Cir. 2001) (citing *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999)); *United States* v. *Pelullo*, 399 F.3d 197, 223 (3d Cir. 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES HULTSTRAND
Charles Hultstrand P.C.
1811 S. Alma School Road, Suite 245
Mesa, AZ 85201
(480) 222-0009

KENNETH S. GELLER
Counsel of Record
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

MICHAEL S. PAISNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

APRIL 2007

APPENDICES

APPENDIX A

NOT FOR PUBLICATION

United States Court of Appeals, Ninth Circuit

In Re KENNETH PARKER, Debtor

ESTATE OF ELLA M. PARKER,
Appellant,

v.

SEDONA GOLF RESORT, L.C.
Appellee.

No. 04-16962.

Argued and Submitted October 20, 2006.

Filed Nov. 2, 2006.

Before: O'CONNOR, Associate Justice, Retired,* and RYMER, and THOMAS, Circuit Judges.

MEMORANDUM†

The Estate of Ella Parker ("Estate") appeals a district court decision affirming the bankruptcy court's ruling quieting title to a piece of property ("the road") in Sedona, Arizona in favor of Parker's opponent, Sedona Golf Resort ("the Resort"). We affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

† This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I

The bankruptcy court did not err in concluding that Ella Parker did not acquire an interest in the road through foreclosure on Kenneth Parker's shares of stock in the Ridge at Sedona, Inc. ("RSI"). The Estate argues that when RSI's corporate charter was revoked in 1990, all its assets, as a matter of law, devolved to its shareholders, which included Kenneth Parker who owned 70 percent of RSI. The Estate further asserts that Ella Parker acquired Kenneth Parker's stock in 1991 when she foreclosed on a lien.

The bankruptcy court correctly concluded that, under Arizona law, the assets of the corporation are not automatically transferred to its shareholders upon mere involuntary revocation of the corporate charter. Indeed, Arizona law permits corporations whose charters have been revoked to continue to take action to protect the assets of the corporation. *Goldfield Mines, Inc.* v. *Darrell G. Hand*, 711 P.2d 637, 642 (Ariz. Ct. App. 1985). Under Arizona law applicable during the relevant period, additional formal procedural steps were required for the transfer of corporate assets to the shareholders. *See* Ariz. Rev. Stat. Ann. § 10-102 (West 1990) ("In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation shall have been paid and discharged, and all remaining property and assets distributed to shareholders . . . the court shall enter a judgment dissolving the corporation").

There is nothing in the record to indicate that the proper procedural steps were followed. In fact, the record shows that the allegedly dissolved corporation filed a voluntary petition in bankruptcy in its own name and right *after* the date RSI allegedly dissolved. Given the factual record, the bankruptcy court correctly concluded that title to the RSI assets, including RSI's interest in the road, had not transferred to Kenneth Parker by operation of law.

Further, the bankruptcy court properly concluded that the Estate had not established that Ella Parker had acquired by lien foreclosure whatever individual interest Kenneth Parker had in the road. There is no documentary evidence of any lien of record, or of a lien foreclosure. The only evidence tendered was oral testimony from Kenneth Parker, which the bankruptcy court had the discretion to reject.

The Estate contends that the bankruptcy court erred in placing an affirmative burden of proof on it to show ownership of the road. However, in a quiet title action, each party bears the burden of establishing its affirmative title claims in order to quiet title in its favor. *See, e.g., Lewis* v. *Farrah*, 180 P.2d 578, 579 (Ariz. 1947).

II

The bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel against the Resort. The Resort gained no "unfair advantage" from advancing the position that the Rodriguez deed of trust resulted from mutual mistake, *Hamilton* v. *State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001), because the Arizona Supreme Court rejected its private plat dedication theory, resulting in the district court's reversal of the bankruptcy court's initial grant of summary judgment. When a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no "risk of inconsistent court determinations." *New Edge Network, Inc.* v. *F. C. C.*, 461 F.3d 1105, 1114 (9th Cir. 2006) (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 751 (2001)). It was therefore not an abuse of discretion for the bankruptcy court to allow Sedona Golf to pursue a theory of ownership based on record title after its initial private plat dedication theory failed.

III

In the end, the bankruptcy court properly held that the presumption created by the Resort's holding of record title was sufficient to quiet title to the road. The district court correctly affirmed this holding.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
IN THE MATTER OF:
Kenneth William Parker
Debtor.
Estate of Ella M. Parker
Defendant/Appellant,
v.
Sedona Golf Resort, L.L.C.,
Plaintiff/Appellee.
CIV 03-1869-PHX-SMM.
Filed September 8, 2004.

MEMORANDUM OF DECISION AND ORDER

Pending before the Court is Plaintiff Appellee's ("Plaintiff") appeal from the decision of Bankruptcy Judge Charles G. Case, II, dated August 22, 2003, and the Judgment of the Bankruptcy Court dated September 11, 2003. After considering the record on appeal and the arguments raised by the parties in their briefing, the Court now issues its ruling.

BACKGROUND

The Excerpts of Record in this case ("Record") reveal the following facts related to the issues on appeal. This adversary proceeding was originally brought on August 21, 1992 in four consolidated bankruptcy cases against 35 named defendants. (R49 at 2). The Complaint was amended three times with the Third Amended Complaint being filed on September 29, 2003. The Third Amended Complaint alleged several damage claims but all were dismissed except for Plaintiff's claim to quiet title to a Sedona road called Ridge Trail Drive ("RTD"). (R49 at 2-3). RTD connects Highway 179 and a subdivision of condominiums known as The Ridge

at Sedona (owned by Debtor Ken Parker through Ridge 4 at Sedona, Inc. "RSI"). (R49 at 2). RSI originally owned RTD. (R20. at 3).

On June 3, 1983, RSI placed RTD (and other parcels of land) into a Trust with Yavapai Title Company ("YTC"). (R20 at 3). Pursuant to the Trust Agreement, RSI conveyed to YTC the following: "Lots 1 through 76, inclusive, and Tracts, A, B, C, D, and G. THE RIDGE AT SEDONA, according to the plat of record in the office of the County Recorder of Yavapai County, Arizona, in Book 23, at pages 58, 59 and 60." An amended Warranty Deed dated October 18, 1983, conveyed "Lots 1 through 69 inclusive, and Tracts A, G, and F and all the common area of Amendment No. 1 to Plat THE RIDGE AT SEDONA, Book 23, page 85-88. Both the Original Plat and the Amended Plat included RTD. It was listed as "Ridge Trail (private roadway)." (R20 at 4; R 52 at ex. 1 p. 4). The Amendment stated that the "private roadways" were to be conveyed to the Ridge at Sedona Homeowner's Association ("HOA"). On June 19, 1985, YTC recorded a Special Warranty Deed conveying to HOA, "all private roadways except that portion of [RTD] that is designated Private Roadway Easement." (R20 at 5).

However, on September 23, 1985, Ken Parker, on behalf of RSI, executed a deed of trust in favor of Joseph Rodriguez. (R20 at 8). RSI was involuntarily dissolved in April, 1990. The deed of trust "was foreclosed in 1992 and SGR's predecessor in interest obtained a quit claim deed from the Rodriguez parents." (R49 at 5). Ken Parker denies that the conveyance from RSI to the Rodriquez parents included RTD, arguing that RTD was mistakenly included. Indeed, the Bankruptcy Court found that "[a]ll parties agree that the inclusion of [RTD] on the deed of trust was a mutual mistake." (R20 at 8). Nonetheless, the ongoing dispute in this case has been whether RTD was included in the conveyance from RSI to YTC, and if not, whether the deed of trust from RSI to Rodriguez included RTD.

Following summary judgment in Plaintiff's favor that YTC had conveyed RTD by plat dedication, Defendants Port and Ella Parker appealed.[1] During that appeal, the District Court certified a question to the Arizona Supreme Court as to whether Arizona recognizes private plat dedication. When the Arizona Supreme Court answered that question in the negative, the District Court reversed Summary Judgment and remanded the case back to the Bankruptcy Court. The parties then filed cross Motions for Summary Judgment, both of which were denied. (R38 at 14). In its Order, the Bankruptcy Court stated that "[t]he only issues properly remaining for decision before this Court are the issues of whether Plaintiffs are entitled to the [RTD] under an estoppel by deed theory or whether the Rodriguezes hold the [RTD] in constructive trust for Defendants." (R38 at 14). Trial on those issues commenced in February, 2003, followed by the Bankruptcy Court's decision quieting title to Plaintiff that was signed on September 11, 2003.[2] This appeal followed.

STANDARD OF REVIEW

The District Court reviews the Bankruptcy Court's orders as an appellate court. *See* 28 U.S.C. § 158; *see In re Siegel*, 105 B.R. 556, 559 (D. Ariz. 1989). The Bankruptcy Court's conclusions of law are reviewed *de novo*, while its findings of fact are reviewed under a clearly erroneous standard. *See In re Tuma*, 916 F.2d 488, 490 (9th Cir. 1990). Review under the clearly erroneous standard is "significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed." *Granite State Ins. Co.* v. *Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1028 (9th Cir.

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[1] Port Parker died shortly before trial and Ella Parker died during the pendency of this appeal. Therefore, her estate has been substituted as the only remaining Defendant Appellant.

[2] HOA has since assigned its interest in RTD to SGR. SGR is the only remaining Plaintiff/Appellee.

1996) (quoting *Concrete Pipe & Products, Inc.* v. *Construction Laborers Pension Trust*, 508, U.S. 603, 623 (1993)).

The district court, as an appellate court, may affirm the Bankruptcy Court on any ground fairly supported by the record. *See. e.g., In Re Leavitt*, 171 F.3d 1219, 1223 (9th Cir. 1999). However, the reviewing court is not a trier of fact and does not ordinarily make findings of fact. *See In re Hotel Hollywood*, 95 B.R. 130, 132 (9th Cir. B.A.P. 1988).

DISCUSSION

In its August 22, 2003 Under Advisement Decision ("Decision"),[3] the Bankruptcy Court rejected Plaintiff's deed by estoppel theory, finding no evidence that "unambiguously" suggests an intent by RSI to transfer RTD specifically, no detrimental reliance by HOA, no actual agreement to transfer RTD, and no active or fraudulent misrepresentation. Defendant did not appeal that portion of the Decision.

The Bankruptcy Court also rejected Defendant's theories. First, Defendant claims title by operation of law. Defendant contends that when RSI's charter was revoked in 1990, its assets devolved to its shareholders. Because Ella Parker had acquired 70% of RSI stock in or about March of 1991, Ella Parker was the sole holder of 70% of RTD. According to the Court, there was no evidence that Ella Parker holds 70% of the stock, the law is not such that real estate passes by operation of law without execution of an instrument of transfer from the dissolved corporation to the shareholders, and even if 70% did transfer to Ella in 1992, it would be to no avail, according to the Bankruptcy Court, because title passed to the Rodriguez Parents by trustee's deed issued following foreclosure. Next, the Bankruptcy Court rejected Defendant's argument that the trustees' sale of RTD was based on an invalid deed of trust, and that therefore, the Rodriguez parents

[3] Unless otherwise indicated, the Bankruptcy Court's findings, conclusions and Order are taken from the Under Advisement Decision issued on August 22, 2003. (R49).

hold the property in constructive trust for Ella Parker (her 70% portion). According to the Bankruptcy Court, there was no evidence to support this finding. Finally, the Bankruptcy Court rejected Defendant's "mutual mistake" theory, finding that the evidence suggests only a unilateral mistake, rather than a mutual mistake, by RSI which is insufficient to invalidate the deed of Trust from RSI to the Rodriguez parents. Because neither party proved its primary claim, the Bankruptcy Court quieted title in Plaintiff based on the quit claim deed from the Rodriguez parents to SGR's predecessor in interest.

> Defendant raises four main issues for review by this Court:
>
> 1. Whether the trial Court correctly applied Arizona law regarding quiet title claims, including the applicable burden of proof; 2. Whether the Bankruptcy Court erred in analyzing the legal effect of the admitted mutual mistake regarding the Rodriguez deed of trust; 3. Whether the trial Court erred in concluding that Ella Parker was not the holder of the stock interest in RSI and therefore, the interest in [RTD]; 4. Whether the Bankruptcy Court erred in refusing to estop Plaintiff from asserting a mutual mistake did not occur after their judicial admissions of mutual mistake in open court and their multiple written representations of mutual mistake.

(Op. Br. at 1). Issues two and four are analyzed together.

A. Application of Arizona Law and the Burden of Proof

Defendant argues that the Bankruptcy Court erroneously placed the burden on Defendant prove ownership of RTD. According to Defendant, the law in Arizona has always been that in a quiet title action, the Plaintiff has the burden to prove the strength of his title rather than the weakness of his adversaries'. *Allison* v. *State*, 420 P.2d 289 (Ariz. 1966).

Plaintiff does not dispute the accuracy of the holding in *Allison* but argues that *Alison* is distinguishable because in that case the Defendant had not affirmatively requested that title be quieted in it either by way of a counterclaim, or as Defendant has done here, by an affirmative request for relief in her pleadings. According to Plaintiff, Alison simply means that whichever party affirmatively seeks to establish title has the burden of doing so. *Saxman* v. *Christmann*, 79 P.2d 520 (1938). However, in *Saxman*, by the time the case went to trial, Plaintiff's quiet title claim was no longer at issue. Only Defendant's quiet title claim remained.

Cases since *Saxman* continue to follow the rule that the burden of proof in a quiet title action is upon the Plaintiff. *State* v. *Crawford*, 475 P.2d 515 (Ariz. Ct. App. 1970); *Chantler* v. *Wood*, 430 P.2d 713, 717-18 (Ariz. Ct. App. 1967). After the plaintiff establishes title in him/herself, the burden then shifts to the defendant to establish that his or her title to the property defeats the plaintiff's claim. *Crawford*, 475 P.2d at 517: 65 Am. Jur. *Quieting Title* § 76 (citations omitted).

In this case, the Bankruptcy Court did hold Plaintiff to its burden of proof, stating "for Defendant to prevail, the Plaintiff, first, must fail to carry its burden of proof on its estoppel claim, and, second, Defendant must carry her burden of proof that title passed to her by operation of law prior to apparent acquisition of title by Plaintiff's predecessors in interest." The Bankruptcy Court then determined that "neither party proved its primary claim." Therefore, the Court can conclude as a matter of law that the Bankruptcy Court did not place the burden upon the wrong party in this quiet title action.

B. Mutual Mistake

Defendant argues that the Bankruptcy Court erred by ignoring its own Findings that the Rodriguez Deed of Trust was executed as a result of a mutual mistake. Defendant must

show, by clear and convincing evidence, that a mutual mistake existed. *Rempt* v. *Borgeas*, 583 P.2d 1356, 1358 (Ariz. App. 1978); *Davis* v. *Kleindienst*, 169 P.2d 78, 81 (Ariz. 1946).

The bulk of Defendant's argument on appeal hinges upon Plaintiff allegedly admitting that the Rodriguez Deed of Trust was based upon a mutual mistake between the Rodriguez parents and RSI regarding the inclusion of RTD. According to Defendant, Plaintiff admitted numerous times that the deed of trust to the Rodriguez parents was based on a mutual mistake and should be voided. Defendant cites the Bankruptcy Court Order, later reversed, granting Plaintiff title to RTD in which the court stated that all parties agreed that the inclusion of RTD was a mutual mistake. (R20 at 8). Defendant also cites, for example, the Third Amended Complaint in which Plaintiff states that the Rodriguez Deed should be voided (See R1 at 31-32). In that instance, however, Plaintiff was not referring to the "mutual mistake" when making that assertion. According to Plaintiff, Ken Parker continually made conflicting statements regarding RTD to "cause additional disruption and confusion concerning ownership of" RTD. (R1 at 21-31). Thus, because of the alleged fraud by Ken Parker, Plaintiff claimed the Deed of Trust should be voided. (R1 at 32).

Defendant also cites numerous portions of the record in which Plaintiff, through counsel, admits that the Rodriguez Deed of Trust was based upon a mutual mistake. (App. Br. at 6-8). In Plaintiff's Cross Motion for Summary Judgment, Plaintiff discussed at length, that Port and Ella Parker learned of the "erroneous legal description" in 1991, that RSI had knowledge of the "erroneous legal description" no later than January, 1986 (see R12 at 32), that the Rodriguez Deed of Trust was "admittedly mistaken" as to RTD (see R 12 at 24), and that the legal description attached to the Rodriguez Deed of Trust mistakenly described land which included RTD, "when it should have described the neighboring land com-

monly referred to by the parties as 'the Ridge Spa & Racquet Club.' (See R12 at 24). Even Plaintiff's expert, John Graham, gave an affidavit in which he called the Rodriguez Deed of Trust "generally admitted erroneous."

The Bankruptcy Court concluded that there was insufficient evidence of a "mutual mistake" between RSI and the Rodriguez parents. According to the Bankruptcy Court, "at best the record supports a unilateral mistake by RSI," based in part on the Rodriguez Parents' silence on the issue. The Rodriguez parents did not testify at trial, nor was evidence presented that supports the mutual mistake theory. The Record includes a resolution by the RSI Board of Directors in which the Board granted "the Ridge Club at Sedona, Inc., as security for the promissory note" issued to the Rodriguez parents. (R11 Ex. 38). Ella Parker contends that because the Rodriguez parents were shareholders in RSI, they therefore were part of the mutual mistake of RSI in conveying RTD. However, the resolution of the Board of Directors was signed only by Ken Parker and Ronald Kolb, and was signed "without meeting." Therefore that theory is unpersuasive. Likewise, it is to no avail that Ken Parker, in 1991, and Port Parker, in 1994 each recorded a correction to the official legal description contained in the Rodriguez Deed of Trust to reflect that the RTD was not intended as security for the Rodriguez loan. To begin, the "corrections" were self serving at best, and Port Parker was not even a party to the RSI/Rodriguez parents Deed of Trust.

Next, evidence of Ken Parker's intent to transfer RTD to HOA (SGR's predecessor) further contradicts the evidence that there was a mutual mistake. The Bankruptcy Court cites the following evidence in the record and at trial that Ken Parker's *intent* was to transfer RTD to HOA:

> 1) testimony by the former project manager (supported by a contemporaneously prepared "laundry list" of tasks to be completed) that he was instructed by Parker to "follow up with Frank Kelly at Yavapai

Title to get roads transferred to Homeowners Association" and that he contacted YTC to do so but was advised by YTC that no deed was necessary to transfer RTD because of the dedication in the Plat; 2) a letter from Parker to YTC that "we want all roadways deeded to HOA"; 3) testimony that the HOA paid for (or reimbursed RSI for) maintenance and upkeep expenses related to RTD; 4) testimony that the HOA paid the real property taxes on RTD; 5) testimony by the former project manager that, at the direction of Parker, he told Yavapai County Planning and zoning that RTD was in the hands of the HOA and would be transferred to the new master HOA as and when the project became more fully developed; 6) representations in filings with ADOR that, among other things, "private roads guaranteeing access have been constructed from Highway 179"; 7) testimony from the former HOA president that the HOA believed it owned RTD and paid expenses related to it; and 8) numerous subdivision reports signed by Parker suggesting that all roads were owned and to be maintained by the HOA.

Based upon the record, and giving deference to the Bankruptcy Court's findings of fact, this Court does not find that the Bankruptcy Court erred when it determined that there was not clear and convincing evidence of a mutual mistake between RSI and the Rodriguez parents.

C. Ella Parker's Alleged 70% Ownership of RTD.

Defendant claims ownership of RTD as 70% shareholder of RSI. According to Defendant, upon dissolution of RSI in 1990, title to the corporation's property, including RTD, passed to the shareholders. Defendant argues that under the law in effect when RSI, dissolved, Ariz. Rev. Stat. ("A.R.S.") § 10-094 et seq. (West 1990), title to corporate property passed to the corporation's shareholders upon dissolution. The Bankruptcy Court cited the 1994 statute, A.R.S. § 10-

1405(A)(2), which provides that "[d]issolution of a corporation does not . . .[t]ransfer title to the corporation's property." The Bankruptcy Court also cited *Thomas* v. *Harper*, 481 P.2d 510, 511 (Ariz. Ct. App. 1971), which held that legal title to the property of a corporation passes to the stockholders, upon administrative dissolution. That case has not been overturned since the 1994 amendments to the Arizona Statute. As Defendant points out, it is not clear that the 1994 statute would apply to involuntarily dissolved corporations. However, "where a corporation is administratively dissolved and its shareholders continue to actively conduct the business of the corporation, title to the corporate assets arguably passes to the shareholders." Arizona Practice Series: Corporate Practice, Terence W. Thompson, et al., vol. 6, § 9.46 (West 2003).

That being arguably true, Defendant nonetheless failed to provide evidence that she owns 70% of RSI's stock. There is no evidence that Defendant owns either 70% of RSI's stock, or that RSI owns RTD. The Bankruptcy Court found, and this Court now affirms that there was no mutual mistake between RSI and the Rodriguez parents when RTD was conveyed to the Rodriguez parents in 1985. Thus, RSI did not have title to RTD when is was involuntarily dissolved. Therefore, Defendant's argument that she owns 70% of RTD by virtue of devolution upon dissolution, must fail. The Bankruptcy Court did not err.

CONCLUSION

For the foregoing reasons, the Court will affirm the Bankruptcy Court's determination that there is insufficient evidence to establish that RTD devolved from RSI to Plaintiff by virtue of the revocation of RSI's corporate charter, and that the Rodriguez Deed of Trust was executed as a result of a mutual mistake to include RTD in the conveyance. Furthermore, the Bankruptcy Court did not improperly place the burden of proof on Defendants.

Therefore,

IT IS ORDERED that the Bankruptcy Court's Order dated September 11, 2003, is **AFFIRMED**.

IT IS FURTHER ORDERED that a copy of this Order be mailed to the United States Bankruptcy Court, District of Arizona, the Honorable Charles G. Case, II.

DATED this _3_ day of September, 2004.

/s/
Stephen M. McNamee
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY Court
IN AND FOR THE DISTRICT OF ARIZONA
In Re: KENNETH W. PARKER
Debtor.
SEDONA GOLF RESORT, L.C., an
Arizona Limited Liability Company,
Plaintiff
v.
ELLA M. PARKER,
Defendant
Case No. B-92-5793-PHX-CGC.
UNDER ADVISEMENT DECISION
RE: TRIAL
August 22, 2003

I. Introduction

A. Overview[1]

The area in and around Sedona, Arizona is world famous for its magnificent red rocks, its art galleries, the densely forested steep walls of Oak Creek Canyon, the gurgling waters of the creek itself, and some-say, a unique convergence of energy vortexes.[2] To get there from Phoenix, the normal route is to travel north on Interstate 17. At about milepost 298, there is an exit to State Route 179, the main highway into red rock country. Once a sleepy gateway with only camping and rudimentary cabins, the area has seen explosive

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[1] This Under Advisement Decision contains the Courts findings of fact and conclusions of law as required by F.R.B.P. 7052.

[2] Indeed, the metes and bounds description of one key parcel in this case includes a reference to a property line with the "Spiritual Life Institute."

development over the last three decades that has dramatically changed its character. A few miles from the interstate highway, the building begins in earnest. The first major resort/recreational/housing developing – before Oak Creek Country Club, Poco Diablo, L'Auberge de Sedona, Slide Rock, Tlaquepaque or the town of Sedona itself – is the Sedona Golf Resort and surrounding residential and commercial areas.

About twenty years ago, a first subdivision of condominiums (with a Racquet Club and Spa), known as The Ridge at Sedona, began to appear, developed by the Debtor in this case, Ken Parker ("Parker"), through his majority owned company, the Ridge at Sedona, Inc. ("RIS"). In the year since, an upscale golf course, more housing, and a hotel have all been built. A short road know as "Ridge Trail Drive" ("RTD")[3] connects Highway 179 to the condominiums, the golf course and the surrounding development. This eleven year old lawsuit is a struggle between Parker's mother (claiming through Parker's original interest in RSI) and the current owner of the overall master planned development, Sedona Golf Resort, L.C. ("SGR") and/or "Plaintiff"), over who owns that small stretch of road.[4]

B. Procedural background

This adversary proceeding was originally brought in four consolidated bankruptcy cases by SGR and the Ridge at Sedona Association of Homeowners, Inc. ("HOA") against 35 named defendants. The current operative complaint – the Third Amended Complaint – was filed on September 13, 1993 Docket #79). That Complaint alleged several damage claims against various defendants, non-discharg[]ability of debt against debtor Ken Parker, and quiet title as to RTD. As

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[3] For purposes of this decision, "RTD" refers only to the entrance road portion of the road, not the portion internal to the subdivision.

[4] Ownership will eventually end up in Yavapai County as RTD is currently subject to condemnation proceedings.

set forth in more detail below, all claims other than quiet title by SGR against Port and Ella Parker ("Parker Parents") were eventually dismissed.[5] Since the death of the Port Parker, the sole remaining defendant has been Ella Parker ("Ella" and/or "Defendant").

Private plat dedication was the Plaintiff's primary theory to quiet title to RTD. According to Plaintiff, RSI entered into a certain Trust Agreement establishing Trust No. 266 at Yavapai Title Company ("YTC"). Pursuant to the Trust, RSI conveyed to YTC on June 3, 1983, certain land and interests by warranty deed, which referenced the Original Plat and conveyed:

> Lots 1 through 76, inclusive, and Tracts A, B, C, D, F and G, THE RIDGE AT SEDONA, according to the plat of record in the office of the County Recorder of Yavapai County, Arizona, in Book 23 at pages 58, 59 and 60.

An amended warranty deed was filed a few months later and conveyed:

> Lots 1 through 69, inclusive, and Tracts A, G and F and all the common area of Amendment No. 1 to Plat THE RIDGE AT SEDONA, Book 23, page 85-88.

YTC held title to the Trust Property for the purposes of, in part, subdividing, platting, dedicating, deeding, and conveying the Trust Property. YTC executed the Declaration of Plat and recorded the Original Plat and the Amendment No. 1 to the Plat. The first three pages of the Amendment No. 1 to the Plat describe a condominium development, including in-

[5] The HOA quit claimed any interest it had in the road to SGR, leaving SGR as the sole remaining plaintiff. As part of the dismissal of the quiet title action against parties other than the Parker Parents, each such defendant, including Joe and Lupe Rodriguez ("Rodriguez Parents"), quit claimed their interest in RTD to SGR's predecessor in interest.

terior roads, location and dimensions of the lots, and the location and construction style of the buildings. The first page of the Amendment states that "[t]his Plat sets forth the location and gives the dimensions of areas designated on the Plat as 'Private Roadways' and fee title to which is reserved by the undersigned [YTC] to be conveyed to 'THE RIDGE AT SEDONA' Association." Page 4 is a map of the "Ridge Trail Road," and is designated as a "Private Roadway E[a]sm[en]t.

SGR was granted summary on the theory that the Plat was a private dedication of RTD to the HOA and that SGR, in turn, was the successor in interest to the HOA. This ruling was appealed to the District Court, which certified to the Arizona Supreme Court the question of whether private roadways could be dedicated by plat under Arizona common law.[6] When the Supreme Court answered in the negative, the District Court reversed and remanded. Thus, "private plat dedication" is no longer a viable theory in this case.

Plaintiff's "private plat dedication" theory was largely based upon an affidavit opinion from John Graham, Regional Counsel for First American Title Company ("Graham"), that the Plat itself conveyed the road to the HOA. At trial, Graham took a different tack, asserting that the Plat was more a "declaration" than a "dedication." For the road actually to pass from RSI to YTC to the HOA, Graham now acknowledges that further instruments of conveyance would be needed. There are no such instruments in this case.[7]

Following remand, Ella sought summary disposition in her favor based on the District Court decision and SGR reurged summary judgment on alternative grounds. The Court at that time reviewed all previous proceedings and filings and denied both motions, concluding that the District Court could

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[6] There is no statutory scheme for private plat dedication.

[7] Thus, although he suggested that a specific performance lawsuit might lie, he agreed that First American would not insure the title based upon the Plat itself.

not have disposed of issues not properly before it and that fact issues precluded summary judgment on the remaining theories. The Court did state that the "only issues remaining for decision ... are ... whether Plaintiffs' [sic] are entitled to the Entrance Road under an estoppel by deed theory or whether the Rodriguezes hold the Entrance Road in constructive trust for Defendants" (Docket #316).

The case went dormant for some time thereafter until trial approached in 2002. After several continuances, the case was set for trial and both parties filed motions in limine. The key issues were whether 1) a transcript of a May, 1992 telephone conference call[8] should be admitted in evidence and 2) Graham should be allowed to offer a new expert opinion about the current state of record title. Again, the Court exhaustively reviewed the prior history of the case, including prior hearings, pleadings, orders, minute entries and transcripts. As to the first issue, the Court ruled that the transcript would be admitted over a hearsay objection only if adequate admissible evidence was presented indicating that the parties on the call, specifically Mothershead and Musgrove, had actual authority to act on behalf of the Rodriguez Parents and Parker Parents, respectively. If so, then an agreement, if any, reflected in the transcript could be attributed to the principals as their "verbal act", thereby taking the evidence out of the reach of the hearsay rule. *See* Federal Rules of Evidence

[8] The call was among Robert Mothershead, James Musgrove, Ken Parker, Ron Kolb and Sonny Rodriquez and took place the day before the scheduled trustee's sale on a deed of trust in favor of the Rodriguez Parents covering RTD. It was secretly tape recorded by Mothershead; the tape came to light during the disclosure/discovery phase of a lawsuit brought against him for malpractice by the Rodriguez Parents. The transcript was made by a court reporter listening to the tape; there was no contemporaneous stenographic record.

(F.R.E.) 801; Hon. Barry Russell, Bankruptcy Evidence Manual § 801.2, p. 867.[9]

The second issue raised a fundamental question about the scope of the litigation. Graham's new opinion of record title was based upon a deed of trust given by RSI to the Rodriguez Parents in 1985 to secure a loan of $150,000.00 ("DOT"). The legal description in the DOT included RTD. The DOT was foreclosed in 1992 and SGR's predecessor in interest obtained a quit claim from the Rodriguez Parents.

Parker has challenged the correctness of the DOT legal description for years, asserting it was the result of a mutual mistake. During the time it was propounding its private plat dedication theory, SGR took the position that the DOT should be invalidated. Parker vehemently argued that SGR should not be allowed to reverse field and now assert a claim based upon the DOT after having sought in the Third Amended Complaint to have the DOT invalidated and having asserted throughout the proceedings that the DOT was the result of a mutual mistake.[10] As noted in the in limine ruling

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[9] The ruling did not address authenticity and the other foundational issues which were reserved for trial.

[10] Parker cited four specific instances to establish that SGR embraced the "mutual mistake" theory and should not be estopped from discarding it. None is convincing: 1) Paragraph 8(A)(2) of the Third Amended Complaint (Docket #79, p. 21, line 21, to p. 23, line 9). This paragraph alleges, on information and belief, that Parker participated in the May, 1992, phone call and participated in arriving at the so-called trust agreement, as to which there was never any final documentation. It does not affirmatively allege a "mutual mistake." 2) Mr. Dunlavey, then one of Plaintiff's counsel, agreed during oral argument to the non-controversial proposition that an agreed mutual mistake would render a deed invalid. He did not agree or argue that this DOT was the result of a mutual mistake. 3) Plaintiff's Statement of Facts (Docket #234, ¶ 46) states: "[B]oth RSI and the Rodriguezes failed to protect themselves from making the mutual mistake regarding the legal de-

transcript (Docket #237), that is not an accurate summary of SGR's position. From the beginning, SGR's primary claim was that RSI transferred RTD in 1983, either by deed or dedication or estoppel, to YTC for the benefit of the HOA through which SGR now claims. As such, the argument goes, RSI did not own RTD at the time the DOT was granted and therefore the DOT should be invalid as to RTD.

However, the fundamental underpinning to SGR's position was removed by the Arizona Supreme Court and that basis for attacking the validity of the DOT no linger exists. So SGR now argues that if the DOT were valid, it would be the "baseline" from which title derived. Parker sharply disagrees, stating that the "baseline" should be original ownership in RSI and devolution of 70% of that ownership to the Parker Parents upon revocation of the charter and dissolution of the corporation. But, as the Court noted in its ruling, this argument *assumes* that the DOT was invalid or that the Rodriguez Parents held the property post-trustee's sale in trust for the original ownership, including Ella's 70%. There has yet to be any judicial determination that either of these assumptions is correct.

Thus, the issue presented by the Graham motion in limine was what to do if both Plaintiff's and Defendant's primary theories failed. What if there was no deed by estoppel?

What if Parker Parents did not hold RTD as successors to RSI or there was inadequate proof of a trust? What then?

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scription attached to the 9/23/85 Rodriguez Deed of Trust." Mention of the words "mutual mistake" in this context is hardly a judicial admission or an act from which estoppel should be found. 4) Graham's statement in his affidavit (Exhibit 51) that the DOT was "generally admitted erroneous." His testimony, consistent with SGR's position from the beginning, was that it was erroneous because RSI did not own it at the time it was purportedly given as security.

> Balancing all of these issues, the Court concluded as follows:
>
> If both of the primary claims fail for lack of proof, the Court will consider that the validity of the Rodriguez deed of trust is at issue .... [E]ither party may introduce evidence on the issue and validity of the deed of trust and trustee's deed, and may assert ... whatever arguments it wishes ... concerning the validity of that deed.
>
> The bottom line is that I conclude that it would manifestly unjust for a final judgment in this proceeding to be based upon a deed of trust, the validity of which has been contested by both parties, unless those parties have had the opportunity to make a record on the validity of the deed of trust and the Court has had the opportunity to consider it.

Docket #237, pp. 16-17).

Following this ruling, the remaining claims were then tried to court on February 24 and 25, 2003, at which time the matter was taken under advisement.

II. Analysis

A. Introduction

There is much that is unusual about this case. Normally, a plaintiff in a quiet title action alleges that it is the true holder of title against a defendant who is the record holder of title. For example, in a case based on adverse possession, a plaintiff would argue that its open and notorious occupation of the premises defeats the defendant's record title. *See Overson* v. *Cowley*, 136 Ariz. 60, 664 P.2d 210 (App. 1982). Or, in a case based upon fraud a plaintiff would argue that defendant's title should be divested in favor of plaintiff's claim because it was acquired by fraud. *See Eckert* v. *Miller*, 57 Ariz. 294, 111 P.2d 60 (1941). In either such case, if the plaintiff fails to carry its burden of proof, the result is judgment for the defendant.

Here, however, Defendant needs more than that to prevail because she is *not* the holder of record title. Defendant's claim is premised on her argument that, as the 70% shareholder of a defunct corporation that *once* had title, title passed to her by operation of law *and did not* pass to Plaintiff through subsequent deeds from grantees in the actual chain of title. For indeed, the record demonstrates, that it is *Plaintiff* who is in the enviable position of holding record title; however, notwithstanding this apparently crucial fact, Plaintiff's primary claim for relief is *not* based upon record title but rather on an equitable theory of estoppel. Thus, for Defendant to prevail, the Plaintiff, first, must fail to carry its burden of proof on its estoppel claim, and, second Defendant must carry *her* burden of proof that title passed to her by operation of law *prior* to apparent acquisition of title by Plaintiff's predecessors in interest.

B. Basic Title Facts

Title to RTD was originally acquired by RSI as part of the assemblage of properties in the development of the Ridge at Sedona. RSI was incorporated in 1982. Its shareholders were Parker, 70%; Ron Kolb, 25%; and the Rodriguez Parents, 5%. In June, 1983 RSI transferred certain property to YTC, in trust, for the purpose of establishing the Ridge at Sedona subdivision. On the same day, YTC recorded the original plat, consisting of 3 pages, the third page of which showed RTD. In August, 1983, YTC prepared an Amended Plat (Ex. 1), the fourth page of which showed RTD. The Amended Plat was recorded in October, 1983. RSI acquired the West Half of RTD from Foal Development Company by Warranty Deed, dated May 11, 1984, and recorded May 24, 1984,[11] and the East Half by Warranty Deed from Bar T Bar

[11] Both parties offered this deed in evidence (Plaintiff's Exhibit 28 and Defendant's Exhibit 8). It was recorded nearly a year after the signing of the Amended Plat and six months after the Plat's recordation. It is signed by Parker as President of Foal Development

Ranch, dated November 25, 1984, recorded December 5, 1983, (Exhibit 27) and resulting from an escrow opened August 3, 1983.[12] There is no deed actually conveying either half of RTD to the YTC subdivision trust.[13] RSI's corporate

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Company; there is no explanation in the record for this fact. There is an earlier deed from Foal, dated March 15, 1983 and recorded April 20, 1983, signed by Robert W. Allen with a different legal description. This deed was proffered during the summary judgment proceedings by SGR and was referred to by Graham's during his live testimony in this trial. However, this time around, Graham's chain of title report, Exhibit 26, references the 1984 deed and not the 1983 deed. There was no testimony about which legal description is correct but the inclusion of the 1984 deed in Exhibit 26 and the fact that both parties offered it suggests that it is the proper one and the Court will so find.

[12] Judicial notice of Exhibit 40, Plaintiff's Statement of Facts, Docket #234. *See* F.R.E. 201.

[13] The original RSI to YTC Warranty Deed describes the conveyed property as "Lots 1 through 76, inclusive, and Tracts A, B, C, D, F, and G, THE RIDGE AT SEDONA, according to the Plat of record in the office of the County Recorder of Yavapai County Arizona, in Book 23 at pages 58, 59, and 60." Although RTD is shown on page 3 of this plat, and page 4 of the Amended Plat, and although Foal half was owned by RSI at the time and the Bar T Bar half was in escrow, neither half is within the quoted description. The closest bit of description is Tract A which appears to be the internal portion of RTD in the southern half of the subdivision – but there is no Tract A designation of the entrance road portion of RTD. The amended warranty deed transferred specified lots, plus Tracts A, G and F (two small parcels on that northwest sector of the subdivision and one small parcel in the southeast section of the subdivision) and "all common area," which is clearly shown on page 2 of the plat and does not include RTD. In his original affidavit (Defendant's Exhibit 51), Graham stated that, by this deed, RSI deeded into the YTC trust the "West Half of the entrance portion of Ridge Trail road" and was bound to transfer the other half because of the pending escrow. At trial he agreed on cross examina-

existence was revoked in April, 1990. It filed bankruptcy in 1992; that case was subsequently dismissed.

In October, 1985, RSI granted the DOT in favor of the Rodriguez Parents to secure a loan of $150,000. The legal description of the property subject to the DOT included RTD; Parker alleges that this was a mutual mistake and that only the Spa and Racquet Club property included within the original subdivision (and not included RTD) was intended as security. The corporate records of RSI appear to support this assertion.[14] However, there has been no judicial determination of mutual mistake and no *joint*[15] correction of the officials record. The DOT was foreclosed in May, 1992 and trustee's deed in favor of Rodriguez Parents recorded on May 11, 1992. In January, 1995, Rodriguez Parents quit claimed their interest to Sedona Golf & Tennis Resort, Inc. which then transferred such title to Plaintiff, SGR, by Special Warranty Deed recorded in February, 1995.

C. Plaintiff SGR's Estoppel by Deed Theory

The essence of SGR's primary estoppel claim is that Parker, principal of RSI and the developer of the project, intended from the beginning that RTD be transferred to the HOA and that the HOA, RSI and Parker treated the road as if it had been transferred. All parties agree that there is no actual deed conveying RTD from RSI to HOA.

The evidence for this claim consists of: 1) testimony by the former project manager (supported by a contemporane-

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tion that there was no deed or other means of conveyance of either half.

[14] Defendant's Exhibit 38, a RSI board resolution, authorizes a deed of trust on "the Ridge Club of Sedona, Inc."

[15] While Ken Parker, in 1991, and Port Parker, in 1994, each recorded unilateral statements contesting the correctness of the DOT's legal description, there has never been any such recordings executed by both trustor, RSI, and beneficiary, the Rodriguez Parents.

ously prepared "laundry list" of tasks to be completed) that he was instructed by Parker to "follow up with Frank Kelly at Yavapai Title to get roads transferred to Homeowners Association" and that he contacted YTC to do so but was advised by YTC that no deed was necessary to transfer RTD because of the dedication in the Plat; 2) a letter from Parker to YTC that "we want all roadways deeded to HOA"; 3) testimony that the HOA paid for (or reimbursed RSI for) maintenance and upkeep expenses related to RTD; 4) testimony that the HOA paid the real property taxes on RTD; 5) testimony by the former project manager that, at the direction of Parker, he told Yavapai County Planning and Zoning that RTD was in the hands of the HOA and would be transferred to a new master HOA as and when the project became more fully developed; 6) representations in filings with ADOR that, among other things, "private roads guaranteeing access have been constructed from Highway 179"; 7) testimony from the former HOA president that the HOA believed it owned RTD and paid expenses related to it; and 8) numerous subdivision reports signed by Parker suggesting that all roads were owned and to be maintained by the HOA. SGR concedes that there is no "silver bullet" within this mass of evidence specifically setting forth an agreement, or even a representation, that RTD, by name or unmistakable description, was to be transferred. All references are generally to "roads," "access," or "roadways" rather than unambiguously to RTD. Based on this evidence, SGR asserts that equity should make happen what was intended to happen, and the Court should find that RTD was transferred to the HOA and that SGR now owns it as successor in interest.

While this argument has some surface appeal, Plaintiff's argument is fundamentally flawed both legally and factually. While Arizona law does recognize a doctrine of "estoppel by deed," that doctrine requires there be an actual deed. *See Allison* v. *State*, 101 Ariz. 418, 420 P.2d 289 (1966); *see also* 31, C.J.S., Estoppel and Waiver § 10 (August 2002); 28 Am. Jur.

2d, Estoppel and Waiver § 10 (May 2002). Even a void deed will generally not suffice. *Id.* The essence of estoppel by deed is that parties "cannot . . . adopt portions [of deeds] which operate in their favor and at the same time repudiate those which are counter or adverse to their interest." *Allison*, 101 Ariz. at 421, 420 P.2d at 292; *see also Phelps Dodge Corp.* v. *Arizona*, 548 F.2d 1383, 1385-86 (9th Cir. 1977). Estoppel by deed precludes a party from denying the truth of the deed. *Id.* The parties agree that there is in fact no deed conveying RTD from SGR to the HOA. Thus, estoppel by deed has no relevance to this case.

What Plaintiff really is advocating is a reverse theory, i.e., "deed by estoppel," or simply equitable estoppel. This is quite a radical theory because it suggests that, in the absence of fraud, material misrepresentations or other affirmative wrongdoing (none of which has been alleged or prove), the record title of land may be rewritten because of actions or intentions of an owner that do not appear in the public record. There is little precedent for such a theory in circumstances involving title to real estate where there are strict and explicit rules regarding the proper titling of property.[16]

Typical equitable estoppel cases, including the ones cited by Plaintiffs, are fundamentally different from the situation presented here. Those cases involve principles of estoppel vis-à-vis two parties who negotiated an underlying agreement so that that agreement could be enforced as the parties originally intended. For example, in *Shreeve* v. *Greer*, 65 Ariz. 35, 173 P.2d 641 (1946), the parties entered into a contract to sell a piece of real estate. The seller subsequently changed her mind and sold the property to a third party. The first buyer sued for specific performance, and the court, ap-

[16] Plaintiff's expert, Mr. Graham (a highly experienced title and real estate lawyer with over 30 years in practice), agreed that he was unaware of such a doctrine and had never insured a title based upon it.

plying principles of equity, held that the buyer had acquired the property lawfully and the seller was required to convey to her the property. Absent this relief, the buyer would be deprived of a unique asset – the real estate he had contracted to buy. Similarly, equitable estoppel is applied in situations where the court determines to estop an individual from claiming legal title to property through misrepresentations or other wrongful conduct. *See id.*; *see also Roberts* v. *Friedell*, 15 N.W.2d 496 (App. Minn. 1944). In all of these cases, the courts applied principles of equity to complete what the two parties to the agreement had originally intended to do in order to protect the party who had relied upon the agreement and who had been injured by the other parties' wrongful actions or failure to properly consummate the agreement. That is not the case here. At best, the evidence shows some indication of intent by one party to transfer property; there is no evidence of a two-party agreement to do so or adequate reliance and resulting injury.

SGR's best argument is that it, as successor in interest to the HOA, stands in the HOA's shoes and can assert estoppel claims to the same extent as the HOA could have done. But reliance and injury are part of every estoppel claim. *See Honeywell, Inc.* v. *Arnold Constr. Co., Inc.*, 134 Ariz. 153, 654 P.2d 361 (App. 1982); *Robins Inv. Co.* v. *Green*, 8 Ariz. App. 596, 448 P.2d 440 (1968). So where is the detrimental reliance by the HOA here? There is none. Even accepting Robert Brandin's testimony[17] over Parker's that the HOA actually paid RTD maintenance expenses, such payments are not necessarily an incidence of ownership. Although RSI argues that expense shifting would have been a motivation to transfer the road, an obligation by the HOA to maintain a road owned by someone else would be completely understandable as consideration for ingress and egress – neither of which, on this record, has ever been denied. On the other hand, transferring

[17] Mr. Brandin is a former HOA president.

the road to the Ridge at Sedona HOA would have carried some considerable risk because of the long term development plans for the entire project. RTD is the primary access not only to the condominium development but also to the golf course and, at that time, large parcels of undeveloped residential land. While it would make sense that RTD would eventually be in the hands of a master HOA, with appropriate easements for other users, it makes considerable less sense to have title in only the first HOA. There is no record here, if Plaintiff's theory were to be accepted, of what such easements or other access provisions would have been. Further, as late as 1987, the county tax records (Plaintiff's Exhibit 43) showed RSI as the owner of RTD and no action was taken by either party to change that fact. Thus, even if the record does support a finding that Parker *intended* to transfer RTD, there is no evidence that he ever agreed to do so.[18]

At bottom, while the estoppel evidence does show a pattern of behavior that is highly suggestive of an intent to transfer roads in general, it is only ambiguously suggestive of an intent to transfer RTD specifically. There is no corresponding evidence of detrimental reliance by the HOA or of an actual agreement to transfer RTD, let alone any active or fraudulent misrepresentation. More meat is needed on these bones to rewrite the legal title to real estate. SGR's deed by estoppel argument is based on an untested and suspect legal theory that, even if accepted, is insufficiently supported by this record.

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[18] As owner of the majority of the lots in the early years, RSI controlled the HOA – so any such agreement (and none is proven by this record) would have been between Parker and himself, wearing two different hats. Critically, however, the record is also devoid of any proof of such an agreement, or even a representation, after the HOA became independent. Mr. Brandin, former HOA president, testified by deposition only that he "assumed" the HOA owned RTD because it was paying for maintenance.

For the foregoing reasons, the Court rejects SGR's deed by estoppel theory.

D. Defendant Parker's Theories

1. Devolution by Operation of Law

On the other side of the coin, Ella asserts that RTD devolved from RSI to the Parker Parents by virtue of the revocation of RSI's corporate charter. According to Ella, RSI was the last owner of RTD on which everyone agrees. That corporation was 70% owned by Parker. Ella's claim is that the Parker Parents succeeded to his ownership interest by some means not clearly stated.[19] The argument is that because the Rodriguez Parents' deed of trust was invalid, RSI retained RTD. There were no subsequent transfers, moreover, of RTD by RSI to anyone else. Therefore, when RSI's charter was revoked in 1990, its assets devolved to its shareholders. Ella, after the death of her husband, was a 70% shareholder in RSI and therefore is the sole holder of 70% of RTD.

This argument has serious problems. First, what is the evidence that Ella Parker holds 70% of RSI's stock and why is there no instrument transferring RSI's interest in RTD to her?[20] The ownership of the stock was not an agreed fact in the Joint Pretrial Statement. It may be that this issue has not been a specific point of controversy over the years, but that does not relieve Defendant of the obligation to carry her bur-

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[19] Ken Parker's testimony on this point was confusing and unclear. Giving him the benefit of the doubt, the best that can be said is that he believes his parents held a security interest in his stock in RSI and foreclosed it at some point prior to the revocation of the charter in 1990. No documentary evidence was offered to support this claim.

[20] A.R.S. § 10-1405(B), enacted in 1994, provides that dissolution of a corporation does not "[t]ransfer title to the corporation's assets." Prior statutory law was not specific on this point.

den of proof.[21] As noted, Ken Parker's testimony was not specific and there is no documentary evidence. The point is not frivolous. If Defendant's "operation of law" argument is correct, then proof of ownership is critical. For example, if the stock were still held by Ken Parker at the time of his bankruptcy, it would have become property of his estate. So, where is the security agreement? Where is the proof of foreclosure? What do the records of the Arizona Corporation Commission show? What do the records of the corporation itself show? None of this was addressed.

The legal problems are no less vexing.

No case has been cited that title to real estate passes by operation of law without execution of an instrument of transfer from the dissolved corporation to the shareholders. The oft-cited case *Thomas* v. *Harper*, 14 Ariz. App. 140, 481 P.2d 510 (1971), stands for the proposition that "on dissolution the legal title to the property passes the stockholders subject to payment of debts"; however, Thomas involved a promissory note, not titled real estate. Further, no precedent has been presented where title to real estate was quieted in former shareholders on a "devolution" theory. Indeed, in any event, if title did pass to the shareholders, it was only in trust for creditors. *See Coca-Cola Bottling Co. of Tucson* v. *Commissioner*, 334 F.2d 875 (9th Cir. 1964) (stating that "the settled law of [Arizona's] jurisdiction . . . is that a transferee of an insolvent corporation takes assets of such corporation subject to the payment of its legitimate debts and holds the same in trust for that purpose."); *see also Drew* v. *U.S.*, 367 F.2d 828 (Ct. Cl. 1966) (citing *Love* v. *Bracamonte*, 29 Ariz. 227,

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[21] Defendant breezily contends in her trial memorandum that "Plaintiffs have never challenged [the fact of Ella's 70% ownership] and it would be far too late to raise such an argument --- in the absence of the disclosure of evidence or witnesses to the contrary eleven years after this matter was filed." Defendant has it backwards; it *is her* burden of proof on this issue, not SGR's.

240 P. 351 (1925)). And, we know RSI had creditors because the bankruptcy schedules list them.

Given this record, the Court finds that Defendant has not carried her burden of proof on the issue of ownership and that, even if she had, the law cited is insufficient to support her argument. Since 1994, the statute has been clear that mere dissolution of the corporation does not pass title; neither party has provided the Court with language in effect in 1990 at the time of dissolution. Defendant has provided no analysis on whether this new statutory language was intended to codify existing law or was a change in the law previously applicable. The reason for the statute as it currently exists is starkly illustrated by this case – in the absence of conveyances of record, the world is in the dark about status of title and that is contrary to policies underlying our recording system.

Even if the Court were to find and conclude to the contrary, i.e., that 70% did in fact transfer to the Parker Parents in 1992, it would be to no avail because of the Court's determination, discussed *infra*, that title passed to the Rodriguez Parents by virtue of the trustee's deed issued following foreclosure.

2. Constructive Trust

Similarly, Defendant argues that the trustee's sale on RTD was based on an invalid deed of trust and, therefore, the beneficiary of the deed of trust and the purchaser at the sale, i.e., the Rodriguez Parents, should hold the property in constructive trust for the true owners in their original percentages. Thus, Defendant Ella Parker would presumably own 70% of RTD. This argument fails for the same reasons as the "operation of law theory."

The alternative argument is that following the trustee's sale on the Rodriguez Parents' deed of trust, the prior owners of RSI (Parker, Kolb and Rodriguez) agreed that the Rodri-

guez Parents would hold the property in trust in proportion to their earlier percentage equity interests.[22]

There is no evidence in the record, however, sufficient to support a finding in Defendant's favor on this theory. The transcript of the "secret meeting" among Parker, Kolb and Rodriguez was not admitted and Defendant's attorney in these alleged negotiations, Mr. Musgrove, was not called as a witness, although he was listed. Mr. Musgrove might have been the key witness here and might have established the foundation for a number of important documents.[23] Further, even if the Court were to accept Parker's testimony that there was a deal struck during these telephone negotiations, it was a deal in concept only; it was never effectively reduced to writing.[24] Thus, even if there had been an agreement, it would have been ineffective under the Statute of Frauds. An express trust based on an oral promise modifying the terms of a real estate conveyance absolute on its face is ineffective. *King* v. *Uhlmann*, 103 Ariz. 136, 437 P.2d 928 (1968); *Murillo* v. *Hernandez*, 79 Ariz. 1, 281 P.2d 786 (1955); *Wright* v. *Young*, 20 Ariz. 46, 176 P. 583 (1918).

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[22] Defendant faces, and fails, the same evidentiary hurdles on ownership for this theory.

[23] Defense counsel stated on the record that he did not call Mr. Musgrove because of the Court's ruling denying admission of the transcript. It is counsel's job, but the Court's, to decide who to call as a witness; here, Musgrove certainly could have testified about what he said during the conference call, might have laid foundation sufficient for the admission of his letter to Mothershead, and might have testified about what actions he took or did not take following the call.

[24] Exhibit 4, a letter from Musgrove to Mothershead, was not admitted.

E. Successor to Rodriguez Parents by Quit Claim Deed

What was predicted as possible has therefore become reality. Neither party has carried its burden of proof. So, as outlined above, the Court now turns to title through the DOT.

The records of Yavapai County show title to RTD in SGR by virtue of a quit claim deed from the Rodriguez Parents to SGTR executed in 1994 and recorded in January, 1995, and a special warranty deed from SGTR to SGR. RSI issued to the Rodriguez Parents a deed of trust in 1985 to secure a loan by the Rodriguez Parents to RSI of $150,000. The legal description on the deed of trust encompassed the entire project then owned by RSI, including the Foal property, the BarTBar property and RTD. A rebuttable presumption exists, therefore, that the recorded deed of trust in favor of the Rodriguez Parents was valid and included RTD. See *Hackin* v. *Gaynes*, 103 Ariz. 13, 436 P.2d 127 (1968); *Boone* v. *Grier*, 142 Ariz. 178, 688 P.2d 1070 (App. 1984). Subsequently, the Rodriguez Parents took title to the property, including RTD, by virtue of a trustee's deed on foreclosure of the deed of trust and then quit claimed RTD to SGR's predecessor in interest.

Defendant contends that RSI did not intend to include RTD in the original deed of trust to the Rodriguez Parents and that RTD was mistakenly included in the description of the property subject to the deed of trust because of a *mutual mistake of RSI and the Rodriguez Parents*, which should render the deed of trust invalid. Thus, there could be no subsequent foreclosure involving RTD to the Rodriguez Parents' benefit or subsequent quit claim deed of RTD to SGR. According to Defendant, baseline title to RTD always remained with RSI and not the Rodriguez Parents. Further, Defendant argues that Plaintiff is estopped from now arguing that the DOT is valid where it previously argued that the Court should invalidate the deed of trust based on the mutual mistake of RSI and the Rodriguez Parents.

The Court disagrees. First, SGR has not alleged that inclusion of RTD in the Rodriguez Parents' deed of trust was the result of a mutual mistake between RSI and the Rodriguez parents. It alleged that the DOT should be invalidated because RSI did not own the property. The complaint does not embrace the "mutual mistake" theory.

Defendant asserts that SGR should be estopped from arguing title through the DOT. The court disposed of this argument by denying the Graham motion in limine. In addition, this is not an appropriate case of judicial estoppel. Complex lawsuits often involve inconsistent theories based on alternative facts. Judicial estoppel, however, only applies "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [such that] he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram* v. *Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). This is an essential element of judicial estoppel: Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations." *New Hampshire* v. *Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citing *United States* v. *C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991)). Here, that essential element of judicial estoppel is missing.

Clearly SGR has advocated invalidating the DOT during these proceedings – this follows from its primary theory that RSI didn't own RTD when the DOT was given. That does not now bar RSI from asserting it has title through the DOT.

As a final preliminary matter, Defendant asserts that it is the "law of the case" that there was a mutual mistake. In its

1996 summary judgment Order, the Court wrote the following: "All parties agree that the inclusion of the Entrance Road on the deed of trust was a mutual mistake" (Docket #263, p. 8, lines 7-8). Is this the final word on the subject? No. First, and foremost, that Order was vacated by the District Court's reversal. Second, this was not a factual finding, but a statement as to what the parties believed. Even if it were an actual factual finding, moreover, such finding was not essential, or even relevant, to the issue decided in that Order. As such, the issue is open to re-visitation. *Garvey* v. *Trew*, 64 Ariz. 342, 170 P.2d 845 (1946) (stating well settled rule that dicta is court's opinion on issue not necessary to the ultimate legal decision); *Barrows* v. *Garvey*, 67 Ariz. 202, 193 P.2d 913 (1948) (stating that comments or statements not essential to determination of case at hand are dicta and lack force of adjudication).

There is little controversy that if there is a mutual mistake between the parties to an instrument of conveyance, the instrument may be reformed to effectuate the parties' intent. *Berger* v. *Bhend*, 79 Ariz. 173, 285 P.2d 751 (1955); *Sonnenberg* v. *Ashby*, 17 Ariz. App. 60, 495 P.2d 500 (1972). Here, Defendant has the burden of proving a mutual mistake between RSI and the Rodriguez Parents and has not met that burden.

Ella's counsel's hypothetical question of Graham underscores the difficulty with the mutual mistake theory. Counsel posited that X owns 1807 Newport Drive and wishes to sell it to Y and Y wishes to purchase 1807. However, the legal description on the deed is 1809 Newport Drive. Graham agreed that Y would not have acquired good title in 1809 because of "mutual mistake." The difficulty is two-fold: first, X cannot transfer something he does not own[25] ; and second, there is

[25] A previous objected to and unanswered version of this question appeared to include a suggestion that X owned both parcels, but that was not the question eventually answered by Graham.

no doubt in the example that both grantor and grantee agree that there is a mistake. In this case, the record is barren on that point. At best, Ella can point to suggestions that SGR and its expert (both strangers to the transaction) may have believed there was a mutual mistake,[26] but there is no credible evidence supporting a finding that the Rodriguez Parents, the relevant parties, so believed.

Thus, even if the Court were to find that Plaintiff and Defendant agree the Rodriguez Parents' deed of trust was invalid due to a mutual mistake, that does not in fact mean that there was in fact a mutual mistake as between RSI and the Rodriguez Parents. It makes little difference that two parties (SGR and Defendant) unrelated to the transaction at issue believe there was a mutual mistake. For this Court to invalidate the Rodriguez Parents' deed of trust, there must be a showing by clear and convincing evidence, and not merely a preponderance, of a mutual mistake by and between RSI and the Rodriguez Parents. *See Rempt* v. *Borgeas*, 120 Ariz. 36, 583 P.2d 1356 (App. 1978); *Korrick* v. *Tuller*, 42 Ariz. 493, 27 P.2d 529 (1933); *Home Owners' Loan Corp.* v. *Bank of Ariz.*, 54 Ariz. 146, 94 P.2d 437 (1939). No such showing has been made by either Plaintiff or Defendant.

At best, the record supports a unilateral mistake by RSI. Parker testified that the collateral should have been the Spa property. This is quite likely correct. On August 16, 1991, Kenneth Parker, as president of RSI, recorded an Affidavit of Correction in an attempt to correct the legal description of the property subject to the deed of trust between RSI and the Rodriguez Parents to exclude RTD. Port Parker did the same thing. However, the silence from the Rodriguez Parents is

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[26] Graham testified that he believed the DOT was "erroneous" because RSI had transferred title to YTC to be later transferred to the HOA and, therefore, could not encumber something it did not own, rather than that there was a mutual mistake as to the proper legal description.

deafening. There is no testimony or documentary evidence presented that the Rodriguez Parents believed they were mistakenly granted RTD in the deed of trust. In fact, the only direct evidence in the record is to the contrary. Defendant's Exhibit 43, in evidence, is a complaint for malpractice against Robert Mothershead brought by, among others, the Rodriguez Parents. Among the negligence alleged is Mothershead's failure to obtain title insurance for the DOT property, specifically including RTD after foreclosure. Specifically, the complaint alleges that the $150,000.00 note "was secured by a deed of trust on property of the Resort including the entrance portion of the Resort's road," and that Mothershead "foreclosed on the deed of trust by conducting a trustee's sale. Mothershead failed to represent the Rodriguez Parents at the sale and to obtain title insurance . . ., upon information and belief, a Commitment to Issue Title Insurance had been issued." The harm alleged to have occurred derives from SGR's claim in this adversary that the "Rodriguez Parents do not have clear title to the property and that the property is actually owned by [the HOA]."

To summarize the evidence at best suggests a unilateral mistake by RSI. However, for a unilateral mistake to justify invalidating the deed of trust, the other party must have possessed knowledge of the mistake and must have taken unfair advantage of the error. *Hill-Chafer Partnership* v. *Chilson Family Trust*, 165 Ariz. 469, 473 (1990); see also *Crosby* v. *Andrews*, 55 So. 57 (Fla. 1911) (stating that unilateral mistake will apply where it is a material mistake and made under circumstances that render it inequitable for the other party to have the benefit thereof); *Brown* v. *Bradley*, 259 S.W. 676 (App. Tex. 1924). The "other" means the Rodriguez Parents; Ella introduced no evidence to prove that point and thus unilateral mistake is insufficient. Therefore, title through the DOT will stand.

III. CONCLUSION

At the end of the day, the convoluted journey that is this adversary proceeding leads back to the basics -- neither party proved its primary claim and the presumption that record title is correct has not been overcome. Title will be quieted in Plaintiff. Plaintiff's Counsel is to submit a form of judgment.

So ordered.

DATE AND SIGNATURE ABOVE

APPENDIX D

UNITED STATES BANKRUPTCY Court
IN AND FOR THE DISTRICT OF ARIZONA

In re: KENNETH W. PARKER

Debtor.

SEDONA GOLF RESORT, L.C., an Arizona Limited Liability Company, and THE RIDGE AT SEDONA ASSOCIATION OF HOMEOWNERS, INC., an Arizona non-profit corporation, et. al.

Plaintiffs,

v.

KENNETH WILLIAM PARKER, an unmarried man; PORT W. PARKER and ELLA M. PARKER, husband and wife; THE RIDGE AT SEDONA, INC., a defunct Arizona corporation, et. al.

Defendants.

Chapter 11 Proceedings.

Case No. B-92-5793-PHX-CGC.

UNDER ADVISEMENT ORDER RE: DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS PORT AND ELLA PARKER

NOV. 30 1998

I. INTRODUCTION

This matter is before the Court on Port and Ella Parkers' ("Defendants") Motion for Entry of Judgment in Favor of Port and Ella Parker Following Appellate Decision and Order. Defendants seek entry of judgment in their favor based on the Arizona District Court's May 29, 1998, Memorandum Decision and Order reversing this Court's January 3, 1996, Order and February 27, 1996, Judgment. Plaintiffs Sedona Golf Resort, L.C. and The Ridge at Sedona Association of Homeowners ("SGR" and "HOA" or "Plaintiffs") in turn ar-

gue that the district court's remand of this case to this Court for "further proceedings" means the matter returns to this court to proceed with Plaintiffs' renewed motion for summary judgment. As set forth below, the answer lies somewhere in between.

II. FACTS

A. Undisputed Facts

Certain facts are undisputed and provide a backdrop against which to analyze what remains for this Court to decide. The Ridge at Sedona, Inc. ("RSI") was incorporated in 1982 and acquired the two portions of the Entrance Road (the East half and the West half) sometime in or before 1983 from Foal Development Company and Bar T Bar Ranch, Inc. On June 3, 1983, RSI entered into that certain Trust Agreement establishing Trust No. 266 at Yavapai Title Company pursuant to which numerous pieces of, and interests in, land were placed in trust as the Trust Property. Yavapai Title was Trustee holding title to the Trust Property for the purposes of, in part, subdividing, platting, dedicating, deeding, and conveying the Trust Property ("Yavapai Trust"). Pursuant to the Yavapai Trust, RSI conveyed to Yavapai Title on June 3, 1983, certain land and interests by warranty deed, which referenced the Original Plat and conveyed:

> Lots 1 through 76, inclusive, and Tracts, A, B, C, D, F and G, THE RIDGE AT SEDONA, according to the plat of record in the office of the County Recorder of Yavapai County, Arizona, in Book 23 at pages 58, 59 and 60.

An amended warranty deed was filed a few months later and conveyed:

> Lots 1 through 69, inclusive, and Tracts A, G and F and all the common area of Amendment No. 1 to Plat THE RIDGE AT SEDONA, Book 23, page 85-88.

Yavapai Title executed that certain Declaration of Plat and recorded the Original Plat. The question then for this Court was whether the Entrance Road was conveyed in trust to Yavapai Title under the warranty deed. The Court concluded that the Entrance Road had in fact been dedicated by plat to Yavapai Title in trust for the HOA. On appeal, that decision was overturned, and the matter remanded to this Court.

B. Legal Theories Pled

The question before this Court now is deceptively simple: What legal claims, if any, survive the district court's remand order? To answer this question, we must review the relevant pleadings to determine what claims were raised, what claims were decided, and what claims remain for decision.

The parties agree that the only count remaining from Plaintiffs' Third Amended Complaint is Count VIII.6. entitled "Quiet Title – HOA/Common Areas, Easements, Easements for Ingress-Egress, and Private Roadways." Count VIII.6. is an action to quiet title to what the parties call the "Entrance Road" to the master planned subdivision known as Sedona Golf Resort. Plaintiffs alleged in their Complaint that they own the Entrance Road in fee simple and possess "certain real properties and all improvement thereon, known as HOA/Common Areas, Easements, Easements for Ingress-Egress, and Private Roadways." Plaintiffs sought an order from this Court requiring or finding, *inter alia*, the following:

1. That Defendants "set forth the nature of their claims to the properties";

2. That Plaintiff be declared the owner of the property in fee simple;

3. That "the Rodriguez Parents' Deed of Trust and Assignment of Rents, and the Rodriguez Parents' Trustee's Deed" be declared invalid;

4. That "the First Affidavit of Correction and the Second Affidavit of Correction as to the properties" be declared invalid;

5. That the "RSI [The Ridge at Sedona, Inc.] to Parker Quit Claim Deed, and the Parker to Parker Parents Quit Claim Deed, as to the properties" be declared invalid;

6. That Defendants be permanently enjoined from claiming any interest in the properties; and

7. That Defendants be required to convey the Entrance Road to Plaintiff in trust for the homeowners association.

Nowhere in Count VIII.6. did Plaintiffs identify on what legal theory they held title to the Entrance Road. Instead, by incorporating various sections of their Complaint, Plaintiffs set forth reasons why Defendants did not own the Entrance Road. For example, Plaintiffs incorporated section IV.7.A and 8.A(2), complaining that Defendants filed an improper and invalid First Affidavit of Correction in an attempt to correct an incorrect legal description in the deed of trust executed in favor of Lupe and Joe Rodriguez and that Defendants have made illegal attempts to control and own the Entrance Road. Plaintiffs also incorporated section IV. 10 for the proposition that Kenneth Parker, acting on behalf of the RSI, "repeatedly assured employees and partners of the prior land development partnership, and others, including .. . homeowners, the HOA, ... upon which they relied, that all of the Ridge Trail road was a part of the Project and would always be a part of the Project through the HOA .... On information and belief, such conduct by RSI constituted a complete dedication of and/or a complete waiver, relinquishment, and abandonment of all portions of the Ridge Trail road, to and for the benefit of the Project, the HOA, SGTR, the homeowners."

After several preliminary rulings settling and dismissing various counts of the Complaint, Plaintiffs submitted their Statement of Defendants and Claims indicating what claims

had been dismissed or rendered moot and what claims remained. Again, the only count remaining against Defendants involving the Entrance Road was the original quiet title action as pled in Count VIII.6. of Plaintiffs' Third Amended Complaint. Subsequently, Plaintiffs filed their Memorandum in Support of Determination That Remaining Claims are Core Proceedings. Plaintiffs set forth, for what appears to be the first time, the basis upon which they believe the Court should grant them quiet title in the Entrance Road. They stated that "title was then held by Yavapai Title Company 'in trust' for the HOA/homeowners, and thus the Entrance Road was not property of the estate of RSI." In the alternative, they argued that if the Court considered RSI the owner of the property, that RSI at all times held the property in trust only for the HOA and that any lien on the property was the result of illegality or mutual mistake.[1]

In June of 1995, Plaintiffs filed a Motion for Entry of Partial Summary Judgment with respect to the Entrance Road and several other tracts of property. Plaintiffs sought summary judgment against Defendant Port Parker on the ground that his failure to answer Plaintiffs' request for admissions resulted in Port Parker having waived any argument that he had an interest in the Entrance Road. With respect to the quiet title claim against Defendant Ella Parker, Plaintiffs stated there were questions of material fact and the matter should proceed to trial.[2]

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[1] Plaintiffs also requested this Court review its 1/10/89 summary judgment order and find that it was "not legally valid to convey fee title to the Entrance Road to The Club, and thus the Entrance Road was not the property of the estate of RSI" or that it was "legally valid to convey fee title to the Entrance Road to The Club, because the Entrance Road was located in Phase III of the Project."

[2] The remaining arguments involved only Kenneth Parker, RSI, and the Internal Revenue Service not at issue here.

Defendants responded and cross moved, arguing that RSI acquired the Entrance Road through two different transactions in the early 1980s from Bar T Ranch and Foal Development Company. Subsequently, in exchange for a loan of $150,000 from Lupe and Joe Rodriguez, RSI secured the loan with a deed of trust for The Ridge Spa and Racquet Club. According to Defendants, however, their attorney erroneously appended to the deed a legal description of the entire commercial property, which included the Entrance Road. When the loan went into default, Kenneth Parker filed an Affidavit of Correction to prevent foreclosure on the Entrance Road. Defendants and the Rodriguezes then allegedly reached an agreement that the Entrance Road be held in trust for Defendants. Therefore, Defendants claimed the agreement created a resulting or constructive trust in favor of Defendants. Defendants further argued that Plaintiffs could not possibly own the property through Yavapai Title where there was no deed conveying the Entrance Road from RSI to Yavapai Title so that Entrance Road in turn could be held in trust for the HOA.

This Court granted summary judgment against Port Parker individually as to his sole and separate property based on his failure to answer the Request for Admissions. The Court reserved ruling on what impact this would have on the Packers' community property interest, if any, as the matter was not sufficiently briefed to support a decision. The parties conceded that with respect to Ella Parker trial was necessary.

Still pending, however, was Defendants' cross motion for summary judgment and Plaintiffs' subsequent response and cross motion for summary judgment. In Plaintiffs' response, they set forth several defenses to Defendants' constructive/resulting trust theory. First, Plaintiffs challenged Defendants' claim of a "secret" agreement between RSI and the Rodriguezes creating a trust in favor of RSI despite foreclosure by the Rodriguezes. Plaintiffs contended that any interest RSI had in the property had been foreclosed years be-

fore the purported conveyance to the Rodriguezes when RSI transferred the road to Yavapai Title; therefore, RSI had no Entrance Road to convey to the Rodriguezes. And, even if it did convey the property accidentally, the subsequent "secret" agreement violated relevant subdivision law, public policy, the Covenants, Conditions and Restrictions applicable to the subdivision, and failed on the grounds of mistake, lack of consideration, and estoppel. Further, Plaintiffs argued that Defendants were estoppel from claiming ownership to the Entrance Road because of prior representations Kenneth Parker made on behalf of RSI to Yavapai Title, the Arizona Department of Real Estate, and this Court in RSI's statements and schedules in its 1992 bankruptcy.

In their cross motion for summary judgment, Plaintiffs claimed title to the Entrance Road under an "immediate chain of title." According to Plaintiffs, RSI transferred the property to Yavapai Title to be held in trust for HOA, and dedicated a fractional undivided interest in the common areas, including the Entrance Road, to each residential unit. HOA then acquired fee title to the Entrance Road in 1994 from Yavapai Title pursuant to a default judgment and stipulation for entry of default judgment, based on Ken Parker's earlier request to Yavapai Title to deed all roadways to HOA. HOA then conditionally returned the Entrance Road to the developer, Sedona Golf & Tennis Resort ("SGTR"), in January of 1995, but HOA retained a perpetual, non-exclusive appurtenant easement over the Entrance Road pursuant to the 1/18/95 Easement and Maintenance Agreement. SGR then acquired substantially all the property comprising the master planned community, including fee title to the Entrance Road, from SGTR in February of 1995.

Defendants responded that RSI never conveyed the Entrance Road to Yavapai Title and, therefore, Yavapai Title could not have conveyed any interest to Plaintiffs. However, even if Yavapai Trust did have title to the property or hold it in trust for the HOA, there was no dedication by plat or

common law dedication to the HOA because dedication by plat requires that the land dedicated be for use by the general public, and not a limited class of people. Therefore, there could be no transfer or dedication to the HOA.

On January 3, 1996, this Court issued its Order finding that inclusion of the Entrance Road on the recorded Amendment No. 1 to the Plat constituted a private dedication of the Entrance Road to Yavapai Title. The Court also discussed Ken Parker's conduct on behalf of RSI and how it impacted the Court's decision. While noting that perhaps one could not create deed by estoppel, the Court declined to decide this issue because Ken Parker's conduct combined with the transfer documents demonstrated that RSI did in fact deed the Entrance Road to Yavapai Title in trust for HOA. Proof of deed by estoppel was unnecessary, as the actual transfer deeds presented were sufficient grounds upon which the Court could find a transfer. Ken Parker's prior statements and course of conduct simply added support to Plaintiffs' position.

With respect to the question of the secret agreement between the Rodriguezes and RSI and whether the Rodriguezes holds title to the property in trust for RSI, the question was now rendered moot by the Court's finding that the Entrance Road had been transferred at an earlier date to Yavapai Title. Therefore, RSI no longer had title to the Entrance Road and could not in turn have encumbered it in favor of the Rodriguezes.

Defendants Port and Ella Parker then filed a Motion for New Trial; to Alter/Amend Judgment; and for Reconsideration, arguing that there could not be a dedication by plat in this use because the law only recognizes dedication by plat for a public use, not a private use. Defendants also challenged the Court's reliance on Ken Parker's conduct and statements to find the Entrance Road was transferred to Yavapai Title in trust for the HOA. The Court denied this motion.

Defendants then appealed this Court's decision to the District Court of Arizona. The issues submitted on appeal were as follows:

1. Whether the Bankruptcy Court erred as a matter of law in granting the Plaintiff's Motion for Summary Judgment and denying the Defendants Port and Ella Parker's Cross Motion for Summary Judgment on the Plaintiff's quiet title Complaint regarding the Ridge Trail Entrance Road;

2. Whether the Bankruptcy Court erred in denying the Defendants Port and Ella Parker's Motion for New Trial; to Alter or Amend Judgment; and for Reconsideration of the Order filed January 3, 1996;

3. Subsidiary issues to the above include but are not limited to:

   1. Whether the Bankruptcy Court erred in determining that a deed which refers only to a plat transfers or conveys as a matter of law property on the plat outside the subdivision simply because it also appears on a map of the area;
   2. Whether Arizona law allows private dedication of property to private owners by plat in the absence of a deed or clear evidence of an intent to dedicate such property;
   3. Whether title to the Ridge Trail Entrance Road can pass to the Plaintiff by "estoppel"; and
   4. Whether Joe and Lupe Rodriguez held the Ridge Trail Entrance Road property in trust for Port and Ella Parker, entitling the Parkers to a summary judgment on the quiet title Complaint.

The District Court for the District of Arizona stated in its memorandum decision that although numerous issues were raised on appeal, the parties agreed the critical issue "was

whether the Entrance Road was conveyed by a private dedication to the Ridge at Sedona, Inc. ("RSI") in trust to Yavapai Title under an amended warranty deed filed on October 19, 1983." Because this was a question of state law and there was no controlling precedence in this State, the district court certified the matter to the Arizona Supreme Court for decision. The Arizona Supreme Court in turn concluded that "Arizona does not recognize a private dedication by plat." The district court then reversed this Court's January 3, 1996, Order and February 27, 1996, Judgment and remanded "for further proceedings consistent with this Order and the holding of the Arizona Supreme Court."

Plaintiffs then renewed their motion for summary judgment before this Court seeking a ruling that Defendants have no legal or equitable interest in the Entrance Road. Plaintiffs contend that they are still entitled to summary judgment in their favor, although not on private dedication grounds, but instead on simple conveyance by deed, estoppel by deed, and equitable principles and remedies, including imposition of a constructive trust over the Entrance Road. Under Plaintiffs' simple conveyance by deed argument, they appear to contend that the Ridge at Sedona subdivision was deeded to Yavapai Title in 1983, that the deeds include the Entrance Road, and that when they were conveyed back to RSI, Yavapai Title did not convey the Entrance Road. Plaintiffs also argue that even if there is some defect in the chain of title, equity urges that title should be quieted in Plaintiffs' favor. Plaintiffs rely on the principle of equitable estoppel to prevent RSI and the Parkers from now claiming ownership in the Entrance Road where their prior conduct and representations supported conveyance to Plaintiffs. In turn, Plaintiffs request this Court impose a constructive trust over any interest Defendants may have in the Entrance Road in favor of SGR (HOA) because, although Defendants may have committed no wrong, it would be inequitable to allow them to retain the property.

In contrast, Defendants seek automatic entry of judgment in their favor, claiming that the appellate decision resolved the last remaining claim of the Plaintiffs. According to Defendants, once the district court concluded that the property was not transferred to Yavapai Title by private dedication, there was no way Yavapai Title could in turn convey it to HOA. Any other grounds upon which Plaintiffs could have prevailed were necessarily rejected by the district court when it determined the only issue for its review was the private dedication by plat theory.

Plaintiffs object to Defendants' request for entry of judgment, arguing that one discrete legal issue was argued on appeal and decided on appeal -- private dedication by plat. Alternative arguments and factual issues still exist, as identified by this Court in its January 3, 1996, Order. This Court only rendered a decision based on the private dedication by plat theory and, thus, this was the only issue on appeal. As a result, the other issues raised throughout these proceedings survive.

III. ANALYSIS

The Court agrees with Defendants that the sole remaining count from Plaintiffs' Third Amended Complaint is Plaintiffs' quiet title action to the Entrance Road. This alone, however, does not determine whether judgment should be automatically entered in Defendants favor. The grounds upon which Plaintiffs contend they are entitled to quiet title in the Entrance Road were not set forth in the Complaint but have, arguably, evolved over time based in part on Defendants' own claims of title to the property. Notice pleading only requires "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Bankr. P. Rule 7008(a); *Conley* v. *Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, L.Ed.2d 80 (1957). Plaintiffs must provide Defendants with fair notice of what Plaintiffs' claims are. While Plaintiffs' Complaint did not necessarily do this initially, Defendants raised no objection. Further, as this case has proceeded

and the claims evolved, both parties have been placed on notice of each others' claims. There can be no claim of surprise at this point.

For example, in response to an Order of this Court, Plaintiffs filed their Memorandum in Support of Determination that Remaining Claims are Core Proceedings, setting forth for the first time the grounds upon which they believed they held title to the Entrance Road. Plaintiffs alleged that RSI either transferred the Entrance Road to Yavapai Title in 1983 to be held in trust for HOA or held the property in trust for HOA itself and that any lien RSI claimed in the Entrance Road was the result of illegality or mutual mistake. Plaintiffs then moved for partial summary judgment on procedural grounds against Defendant Port Parker, as opposed to Plaintiffs' claim they owned the Entrance Road as a result of Defendants transfer to Yavapai Title.

Defendants cross moved, however, claiming that they never transferred the Entrance Road to Yavapai Title and that there was no deed to support such a transfer. In addition, they contended that RSI had in fact accidentally transferred the Entrance Road to the Rodriguezes and subsequently entered into an agreement with the Rodriguezes whereby the Rodriguezes agreed to hold the Entrance Road in a resulting/constructive trust for PSI. Based on these defenses and claims, Plaintiffs in turn raised for the first time that Defendants were estopped from claiming any ownership interest in the Entrance Road and that any secret agreement between Defendants and the Rodriguezes failed for numerous reasons.

At this point, three years after bankruptcy was filed, these were the claims before this Court by the parties with respect to ownership of the Entrance Road. Plaintiffs claimed title by virtue of a transfer from RSI to Yavapai Title and estoppel based on Defendants' actions and representations regarding ownership of the Entrance Road. For this reason, the Court concludes that the time for raising new defenses and claims has passed. Plaintiffs' claim of simple conveyance by

deed raised in their renewed motion for summary judgment, therefore, is too late. This argument should have been raised as an alternative argument at least at the earlier summary judgment stage in response to Defendants' arguments that there was no deed transferring the property to Yavapai Title and that no such thing as private dedication by plat exists in Arizona. Further, to argue simple conveyance by deed at this point makes little sense. If Plaintiffs had title to the property by simple conveyance by deed, there would have been no reason to proceed with the more complicated and previously undecided question of whether Arizona recognized private dedication by plat. This issue should have been raised earlier. For the same reason, this Court finds Plaintiffs' constructive trust argument untimely.

This Court finds, however, that Plaintiffs' remaining estoppel argument in their renewed motion for summary judgment does remain for decision. Plaintiffs raised estoppel by deed earlier in this case in response to Defendants' ownership claim to the Entrance Road. This Court does not find, as Defendants urge, that this issue was decided by this Court in its January 3, 1996, Order 'granting Plaintiffs summary judgment. Nor does this Court find that this issue was necessarily decided and rejected by the district court on appeal.

First, this Court granted Plaintiffs summary judgment on their dedication by plat theory only. It left the question of estoppel by deed undetermined, as it was not necessary to decide once finding a private dedication by plat:

> Ken Parker, on behalf of RSI, acted for at least nine years as though the Entrance Road were owed by or for the benefit of the Association. Through his counsel he now claims that all of his prior actions were irrelevant because one cannot create a deed by estoppel. *Perhaps not*, however Mr Parker's conduct evidences a clear intent that the Entrance Road be held for the Subdivision and that intent, combined with the transfer documents analyzed above, dem-

> onstrates the reality that the Entrance Road was in fact deeded to Yavapai Title in trust for the benefit of the Association. *Likewise, although estoppel may not actually create a deed, an additional deed is not needed in this case.*

(Emphasis added). On appeal, therefore, Defendants improperly included as an issue on appeal "[w]hether title to the Ridge Trail Entrance Road can pass to the Plaintiffs by 'estoppel.'" For an issue to be appealable, it must have been decided by the lower court. If the lower court does not render a decision on a particular issue, then logically there is no decision from which to appeal. Further, summary judgment must have been granted on that issue for an appeal to lie; one cannot appeal the denial of a motion for summary judgment. *Wyle* v. *S&S Credit Co. (In re Hamilton Taft & Co.)*, 53 F.3d 285 (9th Cir. 1995); *Oppenheimer* v. *Los Angeles County Flood Control Dist.*, 453 F.2d 895 (9th Cir. 1972). Generally, if summary judgment is denied on an issue, the matter simply proceeds to trial on the merits. *Id.* Therefore, Plaintiffs' alterative estoppel argument was never ruled on by this Court and could not have been decided by the district court.[3]

While Defendants are correct that lower courts are precluded from reexamining issues decided explicitly or neces-

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[3] For the same reason, Defendants improperly raised as an issue on appeal "[w]hether Joe and Lupe Rodriguez held the Ridge Trail Entrance Road property in trust for Port and Ella Parker, entitling the Parkers to a summary judgment on the quiet title Complaint." This Court expressly left this question open also: "The Court finds that both the Plaintiffs' and the Defendants' arguments [with respect to the Rodriguezes holding title to the Entrance Road] would be subject to disputed questions of fact that would require further evidence and preclude summary judgment. In light of the Court's ruling with regard to Plaintiff's dedication by plat theory, however, RSI did not retain title to the Entrance Road, could not have encumbered it in favor of Rodriguez, and therefore no party could claim title through Rodriguez."

sarily by implication on appeal, that is only when the issues on appeal were properly subject to appeal. The district court in this case properly limited the appeal to the only issue decided by this Court – the private dedication by plat theory. Moreover, Defendants misunderstand the language and holding of *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 814 (9th Cir. 1985). Defendants correctly restate the holding of *In re Sambo's*, but incorrectly interpret the holding to mean that a final appealable order means all issues were actually decided by the lower court and cannot be revisited at some later time depending on the outcome of the appeal. The case in fact stands for the general proposition that for an order to be a final order from which an appeal can be taken, the issue decided by the lower court must be dispositive of the case. Additional or alternative arguments must have either been also decided or rendered moot by the issue that the lower court did actually decide. It does not mean that all issues were actually decided. The case illustrates the difference between final orders and interlocutory orders.

For example, if a plaintiff brought a tort suit on two alternative grounds of pure negligence and strict liability, he may seek summary judgment on both grounds. If the court finds that plaintiff wins on the strict liability grounds, there is no need for the court to reach the question of pure negligence. Therefore, the negligence issue has not been addressed or decided by the court and is not, under *In re Sambo's*, considered decided. If plaintiff's victory on strict liability grounds is reversed on appeal, the matter returns to the lower court for either a decision on summary judgment of the negligence claim or the case proceeds to trial on either or both negligence and strict liability grounds. The reversal does not mean the defendant is automatically entitled to judgment in his favor.

This Court also rejects Defendants' argument that under Bankruptcy Appellate Rule 8013 this Court is limited to simply entering judgment in favor of Defendants because the

district court "did not use the alternative route by sending it back or remand to the Bankruptcy Court '*with instructions*' to make further factual findings." This position flies in the face of the language of the district court's order in which it explicitly "remanded for further proceedings." In no way does this limit the Court to simply entering judgment for Defendants. This Court must proceed in this case in a manner consistent with the district court's ruling.

IV. CONCLUSION

For the foregoing reasons, the Court denies Defendants' Motion for Entry of Judgment in Favor of Port and Ella Parker Following Appellate Decision and Order. In addition, the Court denies Plaintiffs' request for summary judgment on the grounds of constructive trust and simple conveyance by deed. The only issues properly remaining for decision before this Court are the issues of whether Plaintiffs' are entitled to the Entrance Road under an estoppel by deed theory or whether the Rodriguezes hold the Entrance Road in constructive trust for Defendants.

This Court will hold a Rule 7016 scheduling conference to address further scheduling issues and resolution of this matter on Wednesday, January 20, 1999, at 11:00 a.m., Courtroom 6.

So ordered.

DATED: NOV. 30 1998

/s/
CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re: KENNETH W. PARKER,

Debtor.

PORT W. PARKER, et. al.,

Appellants,

v.

SEDONA GOLF RESORT, L.C., et. al.,

Appellees.

CIV 96-920-PHX-SMM.

Filed May 29, 1998.

MEMORANDUM DECISION AND ORDER

Appellants Port W. Parker and Ella M. Parker ("the Parkers") appeal from an adverse judgment from the Bankruptcy Court. The judgment, dated February 27, 1996, was entered pursuant to the Bankruptcy Court's Order dated January 3, 1996, which granted Sedona Golf Resort's Cross-Motion for Summary Judgment.

FACTS

The underlying dispute is an action for quiet title to certain parcels of real property. The parcels are part of a master-planned subdivision known as Sedona Golf Resort (SGR). A small section of Ridge Trail Road that provides an entrance to the subdivision, known by the parties as "Entrance Road," was the subject of SGR's Cross-Motion for Summary Judgment in the quiet title action.

Although numerous arguments were made, the parties agreed that the critical issue was whether Entrance Road was conveyed by a private dedication to the Ridge at Sedona, Inc. ("RSI") in trust to Yavapai Title under an amended warranty deed filed on October 19, 1983 and Amendment No. 1 to the Plat also filed on October 19, 1983.

The Bankruptcy Court reasoned that, because Arizona did not have a statutory scheme for private dedications of roadways, the case must be decided upon common law principles of real estate law. Based upon common law principles, the Bankruptcy Court held that the inclusion of Entrance Road on the recorded Amendment No. 1 to the Plat constituted a private dedication of Entrance Road to Yavapai Title.

The Bankruptcy Court granted SGR's Cross-Motion for Summary Judgment on Entrance Road and later denied the Parkers' Motion for New Trial or to Alter/Amend the Judgment or for Reconsideration.

STANDARD OF REVIEW

The District Court reviews the Bankruptcy Court's orders as an appellate court. *In re Siegel*, 105 B.R. 556, 559 (D. Ariz. 1989). The Bankruptcy Court's conclusions of law are reviewed *de novo*, while its findings of fact are reviewed under a clearly erroneous standard. *In re Tuma*, 916 F.2d 488, 490 (9th Cir. 1990).

DISCUSSION

The critical issue raised in this appeal is whether Arizona common law recognizes a private dedication by plat, and if so, what requirements must be fulfilled in order to transfer private roadways in a subdivision by the filing of a deed with reference to a plat.

Because this question of state law was determinative of the appeal and because there was no controlling precedent in the decisions of the Arizona Supreme Court or the Arizona Court of Appeals, this Court respectfully requested that the Arizona Supreme Court exercise its discretionary authority under Arizona Supreme Court Rule 27 and Ariz. Rev. Stat. § 12-1861 to accept and decide this question.

The Arizona Supreme Court accepted the certified question. On May 21, 1998, the Arizona Supreme Court answered the certified question holding that "Arizona does not recognize a private dedication by plat." *Parker* v. *Sedona Golf Re-*

sort (In re: Kenneth Parker), No. CV-96-0419-CQ, slip op. at ¶ 2 (Ariz. Sup. Ct. May 21, 1998).

The Court reverses the Bankruptcy Court's Order dated January 3, 1996, and judgment dated February 27, 1996, and remands for further proceedings consistent with this Order and the holding of the Arizona Supreme Court.

CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED that the Bankruptcy Court's January 3, 1996, Order and February 27, 1996, judgment are reversed. The action is remanded for further proceedings.

IT IS FURTHER ORDERED that the Clerk of the Court shall terminate this action.

DATED this 27 day of May, 1998.

/s/
Stephen M. McNamee
United States District Judge

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

In re: KENNETH W. PARKER,
Debtor.

PORT W. PARKER, et al.,
Appellants,

v.

SEDONA GOLF RESORT, L.C., et al.,
Appellees.

No. CV-97-0419-CQ.

Filed May 21, 1998.

MEMORANDUM DECISION
(Not for publication;
Rule 111, Rules of the
Arizona Supreme Court)

CERTIFIED QUESTION FROM
THE UNITED STATES DISTRICT COURT

The Honorable Stephen M. McNamee, Judge

QUESTION ANSWERED

McGregor, Justice

Pursuant to Arizona Revised Statutes Annotated section 12-1861, the district court certified the question "[w]hether Arizona common law authorizes a private dedication by plat, and if so, what requirements must be fulfilled in order to transfer private roadways in a subdivision by the filing of a deed with reference to a plat." We limit our answer to the narrow question presented and answer it in the negative.

Although Arizona courts have not specifically held that this state does not recognize the doctrine of private dedication by plat, our court of appeals has stated that dedication requires that the contemplated use for the general public, and

not for a limited class thereof. *City of Scottsdale* v. *Mocho*, 8 Ariz. App. 146, 151, 444 P.2d 437, 442 (1968). This statement comports with the weight of authority that holds that dedications are necessarily public and, thus, cannot be private. See 26 C.J.S. Dedication § 1 (1956) ("A dedication is the devotion of land to a public use, by an unequivocal act of the owner of the fee, manifesting the intention that it shall be accepted and used presently or in the future for such public purpose."); id. § 8 ("[T]here can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public."). We agree with the majority view and therefore hold that Arizona does not recognize a private dedication by plat.

Because we answer the first part of the certified question in the negative, we do not address the second part.

Ruth V. McGregor, Justice

CONCURRING:

Thomas A. Zlaket, Chief Justice

Charles E. Jones, Vice Chief Justice

Frederick J. Martone, Justice

E. G. Noyes, Jr., Judge

Justice Stanley G. Feldman did not participate in the determination of this matter; pursuant to Ariz. Const. art. VI, § 3, the Honorable E. G. Noyes, Jr., Judge of the Arizona Court of Appeals, Division One, was designated to sit in his stead.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re: KENNETH W. PARKER,

Debtor.

PORT W. PARKER, et al.,

Appellants,

v.

SEDONA GOLF RESORT, L.C., et al.,

Appellees.

CIV 96-920-PHX-SMM.

Filed October 3, 1997.

ORDER

Appellants Port W. Parker and Ella M. Parker ("the Parkers") appeal an adverse judgment from the Bankruptcy Court. The judgment, dated February 27, 1996, was entered pursuant to the Bankruptcy Court's Order dated January 3, 1996.

FACTS

The underlying dispute is an action for quiet title to certain parcels of real property. The parcels are part of a master-planned subdivision known as Sedona Golf Resort (SGR). A small section of Ridge Trail Road that provides an entrance to the subdivision, known by the parties as "Entrance Road," was the subject of SGR's Cross-Motion for Summary Judgment in the quiet title action.

Although numerous arguments were made, the parties agreed that the critical issue was whether Entrance Road was conveyed by the Ridge at Sedona, Inc. ("RSI") in trust to Yavapai Title under an amended warranty deed filed on Oc-

tober 19, 1983 and Amendment No. 1 to the Plat also filed on October 19, 1983.[1]

> The amended warranty deed conveyed the following:
>
> Lots 1 though 69, inclusive, and Tracts A, G, and F and all the common areas of Amendment No. 1 to Plat THE RIDGE AT SEDONA, Book 23, page 85-88.

Amendment No. 1 to the Plat is four pages long and the fourth page is the Entrance Road. The fourth page of Amendment No. 1 to the Plat connects to the lower right hand corner of page one of Amendment No. 1 to the Plat, which has the language "Ridge Trail (Private Roadway)." These facts are undisputed by the parties.

In determining the law to apply to these facts the Bankruptcy Court reasoned that, because Arizona did not have a statutory scheme for private dedications of roadways, the case must decided upon common law principles of real estate law.

The Bankruptcy Court determined that common law holds that "[i]n the interpretation of maps and plats all doubts as to the intention of the owner should be resolved most strongly against him." *City of Chicago* v. *Chicago B. & O.R. Co.*, 150 N.E. 250, 253 (1926). Further, the Bankruptcy Court determined that common law holds that when an owner records a plat and lots with reference to the plat by lot number and block number, the recordation constitutes a valid dedication of all streets shown in the plat for the use in common of all lot owners. *See Kennedy* v. *Barnish*, 11 N.W.2d 682, 684 (Wisc. 1943).

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[1] Although the Parkers argue that a Special Warranty Deed filed by Yavapai Trust on October 19, 1983 essentially negated the amended warranty deed, the same analysis applies to the original warranty deed and the original plat. The Court refers solely to the amended warranty deed and Amendment No. 1 to the Plat for simplicity of analysis.

Therefore, the Bankruptcy Court held that the Entrance Road was conveyed to Yavapai Trust pursuant to the amended warranty deed because the amended warranty deed conveyed to Yavapai Title essentially the entire subdivision and referred to lot numbers on Amendment No. 1 to the Plat. Accordingly, the Bankruptcy Court held that the inclusion of Entrance Road on the recorded Amendment No. 1 to the Plat constituted a private dedication of Entrance Road to Yavapai Title.

The Bankruptcy Court granted SGR's Cross-Motion for Summary Judgment on Entrance Road and later denied the Parkers' Motion for New Trial or to Alter/Amend the Judgment or for Reconsideration.

STANDARD OF REVIEW

The District Court reviews the Bankruptcy Court's orders as an appellate court. *In re Siegel*, 105 B.R. 556, 559 (D. Ariz. 1989). The Bankruptcy Court's conclusions of law are reviewed *de novo*, while its findings of fact are reviewed under a clearly erroneous standard. *In re Tuma*, 916 F.2d 488, 490 (9th Cir. 1990).

DISCUSSION

The critical issue raised in this appeal is whether Arizona common law authorizes a private dedication by plat, and if so, what requirements must be fulfilled in order to transfer private roadways in a subdivision by the filing of a deed with reference to a plat.

The Court finds that this question of state law will be determinative of the appeal currently pending in this Court. The Court additionally finds that there is no controlling precedent in the decisions of the Arizona Supreme Court or the Arizona Court of Appeals. Accordingly, the Court respectfully requests that the Arizona Supreme Court exercise its discretionary authority under Arizona Supreme Court Rule 27 and Ariz. Rev. Stat. § 12-1861 to accept and decide this question.

The phrasing of the question should not restrict the Arizona Supreme Court's consideration of the problems and issues involved. The Arizona Supreme Court, of course, may supplement the record in any way it believes appropriate to enable it to answer the certified question. If the Arizona Supreme Court declines certification, it should so state, and this Court will resolve the issues according to its perception of Arizona law.

CONCLUSION

For the foregoing reasons,

IT IS THEREFORE ORDERED that this Court certifies the following question to the Arizona Supreme Court:

> Whether Arizona common law authorizes a private dedication by plat, and if so, what requirements must be fulfilled in order to transfer private roadways in a subdivision by the filing of a deed with reference to a plat.

This Court otherwise retains jurisdiction over this appeal.

IT IS FURTHER ORDERED that the Clerk of the Court shall file with the Arizona Supreme Court an original and six certified copies of this Order and a list of counsel appearing in this matter along with their addresses and telephone numbers.

IT IS FURTHER ORDERED that this action is stayed pending a decision by the Arizona Supreme Court.

DATED this 30 day of September, 1997.

/s/
Stephen M. McNamee
United States District Judge

APPENDIX H

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

In Re: KENNETH W. PARKER

Debtor.

In Re: SEDONA GOLF RESORT, L.C., et. al.

Plaintiffs,

v.

KENNETH WILLIAM PARKER, an unmarried man; PORT W. PARKER and ELLA M. PARKER, husband and wife; THE RIDGE AT SEDONA, INC., a defunct Arizona corporation et. al.,

Defendants.

Chapter 11 Proceedings

Case No. B-92-5793-PHX-CGC.

Filed Jan. 3, 1996.

ORDER RE CROSS MOTION FOR SUMMARY JUDGMENT ON ENTRANCE ROAD

I. INTRODUCTION.

This adversary proceeding was instituted on August 21, 1992, and shortly thereafter was consolidated with several other adversary proceedings, as detailed below. Parallel proceedings have been brought in both district court and state court and certain orders remain on appeal. Disputes among many of the parties have settled during the course of this matter, and what remains is an objection to the discharge of debtor Kenneth W. Parker ("Ken Parker") and an action for quiet title to certain parcels of real property. The parcels are part of a master planned subdivision known as Sedona Golf Resort (the "Subdivision").

A small section of land that provides an entrance to the Subdivision, known by the parties as the "Entrance Road" is

the subject of the pending cross-motions for summary judgment in this quiet title action. Plaintiffs Sedona Golf Resort, L.C., an Arizona limited liability company ("SGR"), and The Ridge at Sedona Association of Homeowners, Inc., an Arizona non-profit corporation (collectively "Plaintiffs") filed a Motion for Entry of Partial Summary Judgment regarding other parcels of land at the Resort. The Court disposed of that Motion for Partial Summary Judgment by separate prior Order.

With their response to the Plaintiff's Motion for Partial Summary Judgment, Defendants Port and Ella Parker and the Ridge at Sedona, Inc. ("RSI") filed a Cross-Motion for Summary Judgment re: the Entrance Road on July 12, 1995. On August 31, 1995, Plaintiffs responded to Defendant's cross motion and filed their own Cross-Motion for Summary Judgment re: the Entrance Road. On October 2, 1995, Defendants filed their Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment Re: the Entrance Road and Response to Plaintiff's Cross Motion for Summary Judgment Re: the Entrance Road. Plaintiffs filed their Reply Brief on October 20, 1995. Both parties also filed voluminous exhibits with their statements of facts in support of their positions.[1]

Lengthy oral argument on the cross-motions was heard by the Court on October 26, 1995 and the cross-motions were taken under advisement. Subsequently, on October 27, 1994, the Defendants filed a Supplemental Response to Court's

[1] The United States of America filed a Response to the Defendant's cross-motion on July 21, 1995 stating that it took no position on whether the Plaintiffs or the Defendants are the rightful owners of the Entrance Road; to the extent defendant the Ridge at Sedona, Inc. is the rightful owner of the Entrance Road, the IRS claims that federal tax liens have attached to it. On September 12, 1995, the IRS filed a similar response to Plaintiff's cross-motion, clarifying that to the extent defendants Port and Ella Parker are the rightful owners of the Entrance Road, the IRS claims that federal tax liens have attached to it.

Questions At Oral Argument. Plaintiffs filed a response to this supplement on November 3, 1995.

II. FACTS.

The statements of facts filed by the parties are voluminous and contain more than twelve years of history regarding title to the Entrance Road. A brief summary follows.

A. RSI's Original Ownership of the Entrance Road

RSI was incorporated on April 12, 1982. The Ridge Trail Road is a road that leads into the Subdivision. A portion of the Ridge Trail Road is the Entrance Road, which was divided into two parts, known by the parties as the west half and the east half. Sometime in or prior to 1983,[2] the west half was owned by Foal Development Co. and the east half was owned by Bar T Bar Ranch, Inc. After sale of both halves to RSI, both companies, Foal and Bar T Bar, retained easements on their respective portions of the Entrance Road.

B. The Creation of the Yavapai Trust and RSI's Deed of Property into the Yavapai Trust

On or about June 3, 1983, RSI entered into that certain Trust Agreement establishing Trust No. 266, at Yavapai Title Company ("Yavapai Title") pursuant to which numerous pieces of land and interests in land (including all or part of the Subdivision[3]) were placed in trust as the Trust Property; Yavapai Title was Trustee holding title to the Trust Property for the purposes of, in part, subdividing, platting, dedicating, deeding, and conveying the Trust Property (this agreement is referred to herein as the "Yavapai Trust"). Plaintiffs Ex. 25.

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[2] The west half of the Entrance Road was acquired by RSI by warranty deed dated March 15, 1983. The precise date in 1983 that the east half of the Entrance Road was acquired by RSI from Bar T Bar Ranch, Inc. is in dispute; Plaintiffs claim it was in August and Defendants claim it was in November.

[3] The core issue here is whether the Entrance Road was part of the property placed in trust pursuant to the Trust Agreement.

Pursuant to the Yavapai Trust, on or about June 3, 1983, RSI conveyed to Yavapai Title certain land and interests by warranty deed, which contained warranty language as set forth in Plaintiff's Ex. 26. The June 3, 1983 deed references the Original Plat (defined in the following section) and conveys:

> Lots 1 through 76, inclusive, and Tracts, A, B, C, D, F and G, THE RIDGE AT SEDONA, according to the plat of record in the office of the County Recorder of Yavapai County, Arizona, in Book 23 at pages 58, 59 and 60.

The dispute in this case concerns whether the Entrance Road was conveyed in trust to Yavapai Title under this warranty deed.

An amended warranty deed dated October 18 and filed on or about October 19, 1983, transfers to Yavapai Title the property described on the Amended Plat (described in the following section). The October 18, 1983 deed conveyed:

> Lots 1 through 69, inclusive, and Tracts A, G and F and all the common area of Amendment No. 1 to Plat THE RIDGE AT SEDONA, Book 23, page 85-88.

See attachment to Defendants Port and Ella Parker Supplemental Response to Court's Questions at Oral Argument.

C. Yavapai Title and the Plats

On June 3, 1983, Yavapai Title executed that certain Declaration of Plat, recorded July 1, 1983 (the "Original Plat"). See Plaintiff's Ex. 1. The Original Plat is three pages long and the third page consists of a small westerly portion of the Ridge Trail Road that is also included on page one of the Original Plat, and the remainder of the third page is the Entrance Road. At the bottom right hand corner of the first page of the Original Plat is the language "Ridge Trail (private roadway)." The third page then can be connected up to the bottom right hand corner of the first page of the Original Plat.

Amendment No. 1 to Plat was recorded on October 19, 1983 (the "Amended Plat"). See Plaintiff's Ex. 2. The Entrance Road appears at page 60 of the Original Plat; it appears at page 88 of the Amended Plat. The Amended Plat is four pages long and the fourth page, again, is the Entrance Road. As with the original plat, the forth page of the Amended Plat connects to the lower right hand corner of page one of the Amended Plat, which has the language "Ridge Trail (Private Roadway)."

D. Yavapai Title Deeds Property to the Association

CC&R's were created and recorded by RSI. In the CC&R's each owner of a residential unit was granted an owner's easement in and to the entire road system and other common areas for vehicular and pedestrian ingress and egress.

On June 19, 1985, Yavapai Title recorded a Special Warranty Deed wherein it conveyed to the Ridge at Sedona Association of Homeowners, Inc. (the "Association") all 'private roadways' except that portion of the Ridge Trail that is designated Private Roadway Easement. On the Original Plat, the Entrance Road has the label "Private Roadway Easement." Plaintiffs Ex. 1.

The Association was incorporated on December 18, 1984. It allegedly acquired title to the Entrance Road from Yavapai Title on June 21, 1994 by virtue of a June 21, 1994 Default Judgment, which incorporated a stipulation for entry of default, which incorporated a January 6, 1994 Special Warranty Deed by Yavapai Title (Grantor) to the Association (Grantee), which deed was recorded January 26, 1995. The Defendants do not deny the judgment, but claim that Yavapai Title never owned the Entrance Road and therefore couldn't transfer it to the Association.

Boiled down, the issue in this case is whether the Entrance Road was included in the property transferred by RSI in trust to Yavapai Title.

E. Affidavits

1. Mark Cheney

Plaintiffs have filed an affidavit of Mark Cheney, the President of Yavapai Title's successor, Yavapai-Coconino Title Agency, Inc., in support of their position. Plaintiff's Ex. 11. In his affidavit, Mr. Cheney describes the transfer by Yavapai Title to the Association in the Special Warranty Deed dated January 6, 1994. He further states that Ken Parker's June 14, 1985 letter to Frank Kelly of Yavapai Title (described below) was never rescinded.

2. Grant Anderson

Plaintiff's filed under oath statements of Grant I. Anderson, a former employee of RSI and Ken Parker, and a registered Arizona Civil Engineer. These statements were primarily in the form of deposition testimony. Mr. Anderson purports to have been working very closely with Ken Parker in the development of the Subdivision, and he recites several incriminating statements of Mr. Parker. He further testifies to his opinion that the Entrance Road was transferred in trust to Yavapai Title for the benefit of the Homeowners Association and residents of the subdivision and that this was in fact always the intention of Ken Parker. Finally, he testified that the roadways on the Original Plat and Amended Plat were dedicated as "common area."

Mr. Parker disputes Mr. Anderson's statements and claims that Mr. Anderson is a disgruntled former employee who was fired and is now seeking revenge.

3. Walter Serrano

In Defendant's Controverting and Supplemental Statement of Facts, filed October 2, 1995, Defendants filed the affidavit of Walter Serrano, who studied the title to the Entrance Road and concluded it was never passed to Yavapai Title.

F. RSI's and Ken Parker's Representations

1. The June 14, 1985 Letter

Ken Parker wrote a letter to Frank Kelly of Yavapai Title, dated June 14, 1985, in which he directed Yavapai Title to convey certain areas of the subdivision, as follows:

> "Dear Frank:
>
> This letter is to serve as written notice that we wish to have all roadways in Amendment No. 1 to Plat of the Ridge at Sedona deeded to The Ridge at Sedona Association of Homeowners, Inc., an Arizona corporation.
>
> It is our request that this be done immediately, Monday, June 17, 1985.
>
> Sincerely,
>
> Kenneth Wm. Parker"

See Plaintiff's Ex. 12A.

2. RSI's prior bankruptcies.

RSI was a debtor in two prior bankruptcy cases, one in 1987 and one in 1992. In neither case did RSI list as an asset of the estate any interest in the Entrance Road.

3. Representations to Arizona Department of Real Estate.

By sworn affidavit dated November 4, 1983, on behalf of RSI, Ken Parker stated:

> Common facilities will consist of private roads, landscaped open areas and walkways. . . . maintenance to be provided by Property Owners' Association. . . . The access road, as shown on the recorded plat, from Arizona Highway 179 to the subdivision has been dedicated as a private roadway. It will be maintained by the property owners' association.

See Plaintiff's Ex. 43. In a June 10, 1987 updated filing with the Arizona Real Estate Department, Ken Parker stated that

the streets *bo[illegible]ng* the subdivision are not public streets and that the "Priv[illegible] Homeowners Assn. allows access." Plaintiff's Ex. 95.

4. Ken Parker's Affidavit

Notwithstanding the above representations, Ken Parker filed an affidavit with Defendant's Controverting and Supplemental Statement of Facts, filed October 2, 1995, in which he disputes the statements of Grant Anderson and Mark Cheney and claims that the Entrance Road was never transferred to the Association, nor was it ever intended to be transferred to the Association.

G. The Association Conveys to SGTR; SGTR conveys to SGR.

Sedona Golf & Tennis Resort, Inc. ("SGTR") allegedly acquired title to the Entrance Road from the Association by Quit Claim Deed dated January 6, 1995. SGR allegedly acquired fee title to the Entrance Road from SGTR by Special Warranty Deed dated February 7, 1995.

The existence and recordation of the deeds described above are not in dispute; what is in dispute is what property was conveyed by the deeds. The parties accept that a grantor cannot convey property in which the grantor has no interest. The dispute in this case concerns the impact of the original conveyance in trust to Yavapai Title, and Yavapai Title's subsequent dedication of the common areas in the subdivision and transfer of the property to the Association. Once the impact of those transfers is decided, the subsequent conveyances fall either on the side of the Plaintiffs or the Defendants.

H. The Rodriguez Deed of Trust

On September 23, 1985, Ken Parker, on behalf of RSI executed a deed of trust in favor of Rodriguez, which deed of trust mistakenly included, among other real property, the Entrance Road. All parties agree that the inclusion of the Entrance Road on the deed of trust was a mutual mistake. De-

fendants claim that they had a secret agreement with Rodriguez that Rodriguez would hold the Entrance Road in trust for Defendants, despite the fact that Rodriguez noticed and held a trustee's sale pursuant to its deed of trust. The facts regarding this agreement are in dispute. After much litigation, Rodriguez executed a Quit Claim deed to the Entrance Road to Plaintiffs.

III. APPLICABLE STANDARD.

A motion for summary judgment should be granted if the movant can show that 1) there is no genuine issue of material fact and 2) movant is entitled to judgment as a matter of law. F.R.Civ.P. 56(c), Fed.R.Bankr.Proc. 7056. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). A material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. *Id.*

In this case all parties have agreed that summary judgment is appropriate and that no genuine issues of fact exist to preclude summary judgment. When questioned on this point at the oral argument on the motions, counsel for all parties agreed on the record that the Court should decide the motions on the evidence and submissions in the record.

IV. ANALYSIS.

A. Dedication by Plat

1. The Transfer Documents

While Arizona has a statutory scheme for dedication of streets and roadways for counties and municipalities, it does not have a statutory scheme for private dedications. Therefore, the result in this case is dependant upon common law principles of real estate law.

"In the interpretation of maps and plats all doubts as to the intention of the owner should be resolved most strongly against him." *City of Chicago* v. *Chicago, B.& O.R. Co.*, 319 Ill. 351, 150 N.E. 250, 253 (1926) (citation omitted).

The Supreme Court of Wisconsin explained in *Kennedy* v. *Bamish*, 244 Wis. 137, 11 N.W.2d 682 (1943) as follows:

> [T]he recording of the plat and the conveyance of lots by the Kennedys, with reference to the plat by lot number and block number, constituted a valid dedication of all streets shown in the plat for the use in common of all lot owners. . . . In any event, plaintiffs are estopped to deny the legal existence of Green Street. In *Smith* v. *Beloit*, 122 Wis. 396, 409, 100 N.W. 877, 882, the court quoted from *Rusk* v. *Berline*, 173 Ill. 634, 50 N.E. 1071, as follows: "Where, after platting land, the owner sells lots and blocks with reference to the streets therein described, both he and his grantees are estopped to deny the legal existence of such streets . . . ."

Kennedy v. *Bamish*, 11 N.W.2d 682, 684-85. As noted above, the key question in this case is *what property was transferred in trust to Yavapai Title.* The applicable deeds are dated June 3, 1983 and October 18, 1983. Both refer to the Ridge at Sedona plats (the Original Plat and the Amended Plat), and both list all of the pages of both plats (three in the case of the Original Plat, and four in the case of the Amended Plat).

The final page of both the Original Plat and the Amended Plat contains the Entrance Road. The deeds and plats have been submitted to the Court for interpretation, and the Court finds that the deeds, both the original and the amended deed from RSI to Yavapai Title, include by their plain language the final pages of the plats and therefore must include the Entrance Road.

Likewise it must follow that the plats recorded by Yavapai Title include the Entrance Road. To hold otherwise would require a finding that (i) the final page of the Original and Amended Plat was mistakenly filed and recorded, or (ii) the filing and recording of the final page was irrelevant. Based

upon the undisputed exhibits submitted by the parties, the Court is unwilling to accept either of those two possibilities. The Entrance Road was included in the deeds from RSI to Yavapai Title and in the Original and Amended Plats.

2. Ken Parker's Conduct on behalf of RSI

Ken Parker, on behalf of RSI, acted for at least nine years as though the Entrance Road were owned by or for the benefit of the Association. Through his counsel he now claims that all of his prior actions were irrelevant because one cannot create a deed by estoppel. Perhaps not, however Mr. Parker's conduct evidences his clear intent that the Entrance Road be held for the Subdivision and that intent, combined with the transfer documents analyzed above, demonstrates the reality that the Entrance Road was in fact deeded to Yavapai Title in trust for the benefit of the Association. Likewise, although estoppel may not actually Create a deed, an additional deed is not needed in this case; the transfer deeds discussed above are sufficient. In addition, estoppel *does preclude* Ken Parker from changing the facts by filing contradicting affidavits or offering contrary testimony when his sworn prior statements demonstrate that RSI transferred title to the Entrance Road to Yavapai Title.

The June 14, 1985 letter by Ken Parker provides "we wish to have all roadways in Amendment No. 1 to Plat of the Ridge at Sedona deeded to The Ridge at Sedona Association." It is indisputable that the Entrance Road is a roadway and is included in Amendment No. 1 to Plat.

On behalf of RSI, Ken Parker filed under oath sworn statements and schedules in RSI's two prior bankruptcies -- cases that continued over a period of several years and included sales of substantial property. Nowhere did RSI or Ken Parker list as an asset *any* interest in the Entrance Road. The fact that the two RSI bankruptcies were ultimately dismissed does not change Ken Parker's representations, on behalf of RSI, regarding its ownership of real estate.

On at least two occasions Ken Parker submitted sworn statements to the Arizona Department of Real Estate stating clearly that the Entrance Road was dedicated as a private roadway to be maintained by the Association, and that the Association provides access to the Subdivision. Now, remarkably, counsel for Ken Parker views all of these actions as irrelevant to whether the Association or RSI holds title to the Entrance Road.

Regarding the affidavits of Walter Serrano, Grant Anderson and Mark Cheney, despite the parties' urging that the Court decide factual issues based upon the record and affidavits submitted, the Court finds that the affidavits are conflicting and live testimony and cross-examination would be necessary to assess the veracity of these individuals if the other undisputed facts were insufficient to support summary judgment. This testimony is not required, however, because the undisputed filed and recorded documents, deeds and plats, and the undisputed statements of Ken Parker, are sufficient to allow summary judgment against the Defendants. The testimony of Walter Serrano, Grant Anderson and Mark Cheney would not change this result.

3. The East Half of the Entrance Road

Notwithstanding the above conclusions, however, an issue still remains as to whether RSI owned the East half of the Entrance Road at the time it purported to transfer it to Yavapai Title.

In August, 1983, RSI entered into a contract with Bar T Bar Ranch to purchase the east half of the Entrance Road. See Plaintiff's Ex. 40 (Escrow instructions for sale of east half from Bar T Bar to RSI/signed by Bar T Bar and RSI). If the Plaintiffs are correct that RSI acquired title to the east half of the Entrance Road from Bar T Bar Ranch at that time, in August, 1983, then RSI's deed to Yavapai Title in October, 1983 and the plat filed in the same month would include the transfer of the fee interest in the east half of the Entrance

Road. Defendants claim, however, that RSI acquired title to the east half of the Entrance Road in November, 1983, when the deed from Bar T Bar Ranch to RSI was recorded. See Plaintiff's Ex. 41 (November deed from Bar T Bar to RSI).

As noted by the Plaintiffs, Arizona courts have held that a vendee/buyer becomes the owner of real property when a binding contract for sale of land is executed; the vendor/seller retains the real property, if at all, in trust for the vendee/buyer. *See, Cote* v. *A.J. Bayless Markets. Inc.*, 128 Ariz. 438, 443 626 P.2d 602, 607 (1981); *Tucker* v. *Byler*, 27 Ariz.App. 704, 708, 558 P.2d 732 (1977). Courts have held that a vendee could dedicate a portion of property to public use and transfer its interest in property to third persons during the executory period of the purchase contract. Id.

Even if the fee interest was not transferred until it was recorded in November, 1983, this Court holds that under after-acquired real property principles, it nonetheless was transferred as a matter of state law, from RSI to Yavapai Title. *See Pearll* v. *Williams*, 146 Ariz. 203, 206, 704 P.2d 1348 (App. 1985).

B. Title through Rodriguez

Defendants claim they are entitled to summary judgment because RSI did retain title to the Entrance Road and that title devolved to RSI's shareholder's when RSI dissolved. Defendants claim a secret agreement with Rodriguez and allege that Rodriguez held the Entrance Road in trust after Rodriguez conducted a trustee's sale pursuant to the deed of trust that mistakenly included the Entrance Road. The secret agreement is evidenced in part by a disputed secret transcript of a telephone conversation. Plaintiffs' alternate theory for summary judgment is that if RSI retained title to the Entrance Road, and subsequently encumbered it in favor of Rodriguez, then the Rodriguez quitclaim deed in favor of Plaintiffs vests title to the Entrance Road in Plaintiffs.

The Court finds that both the Plaintiffs' and the Defendants' arguments in this regard would be subject to disputed questions of fact that would require further evidence and preclude summary judgment. In light of the Court's ruling with regard to Plaintiff's dedication by plat theory, however, RSI did not retain title to the Entrance Road, could not have encumbered it in favor of Rodriguez, and therefore no party could claim title through Rodriguez.

V. CONCLUSION.

For the foregoing reasons, **IT IS ORDERED** as follows:

The Cross-Motion for Summary Judgment filed by Plaintiffs is granted. The Entrance Road was transferred by RSI in trust to Yavapai Title in October, 1983 Plaintiff SGR (Sedona Golf Resort, L.C.) is the rightful owner of the Entrance Road

Plaintiffs are to submit a form of judgment.

So ordered.

DATED: January 3, 1996

/s/
CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

APPENDIX I

United States Court of Appeals, Ninth Circuit

In re KENNETH PARKER, Debtor

Appellant,

v.

SEDONA GOLF RESORT, L.C.

Appellees.

No. 04-16962.

Filed Dec. 18, 2006.

ORDER

Before: O'CONNOR,* RYMER, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Rymer and Thomas voted to reject the suggestion for rehearing en banc and Justice O'Connor so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

APPENDIX J

United States Court of Appeals, Ninth Circuit

In re: KENNETH WILLIAM PARKER,
ELLA M. PARKER, Estate of,
Appellant,

v.

SEDONA GOLF RESORT, L.C.; et al.,
Appellees,

and

PORT W. PARKER; et al.,

No. 04-16962.

JUDGMENT

Appeal from the United States District Court for the District of Arizona (Phoenix).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 11/02/06.

No. 06-1380

FILED
JUN 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ESTATE OF ELLA M. PARKER,

Petitioner,

v.

SEDONA GOLF RESORT, L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MICHAEL K. KENNEDY
Counsel of Record
WM. CHARLES THOMSON
GALLAGHER & KENNEDY, P.A.
2575 E. Camelback Rd.
Phoenix, AZ 85016-9225
(602) 530-8000

STEVEN N. BERGER
ENGELMAN BERGER, P.C.
One Columbus Plaza,
Suite 700
3636 N. Central Ave.
Phoenix, AZ 85012-1936
(602) 271-9090

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioner's "Question Presented" is premised on a misleading assessment of the Ninth Circuit's Memorandum Decision. The real question presented is whether Petitioner has demonstrated any compelling reason to grant the Petition where the Ninth Circuit merely ruled that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel, and nothing in that ruling conflicts with a decision of this Court or any court of appeals.

CORPORATE DISCLOSURE STATEMENT

SunCor Development Company, an Arizona corporation, is the managing member of Respondent Sedona Golf Resort, L.C., an Arizona limited liability company. Pinnacle West Capital Corporation, an Arizona corporation, is the parent company of SunCor Development Company and has issued shares to the public.

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RULES

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SUMMARY OF REASONS FOR DENYING THE PETITION

Respondent opposes a writ of certiorari because: (1) the factual context and record in this case does not support Petitioner's assertion that the Ninth Circuit has adopted a rigid, *per se* rule regarding the doctrine of judicial estoppel, and (2) Petitioner's assertion of a "clear circuit split on an important issue," Pet. at 1, regarding judicial estoppel does not hold up to a basic reading of the legal authorities cited by Petitioner. The decisions below in this case analyze and apply the doctrine of judicial estoppel consistent with the law of this Court and the other circuit courts. After considering the facts of record in this case, the bankruptcy court, sitting as trial court, found that Respondent's alleged prior inconsistent position was presented in a different context as part of a different legal theory that ultimately was rejected on appeal. On the basis of its full inquiry into the record, the bankruptcy court necessarily concluded there was no risk that admission of the allegedly inconsistent evidence at trial would, or did, undermine judicial integrity. The Ninth Circuit merely ruled that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel against Respondent. It did not adopt or enunciate a *per se* rule contrary to this Court or any other circuit court.

STATEMENT OF THE CASE

A. Overview of the Bankruptcy Court Proceedings.

The lengthy course of the litigation before the bankruptcy court from which this matter arises is described in detail in the extensive history set forth in the August 22,

2003 Under Advisement Decision Re: Trial found in Petitioner's Appendices at 16a-40a. That history need not be repeated in this Response, as little of it is relevant to the Petition. Rather, the background provided here focuses on the proceedings directly relevant to Petitioner's contention regarding the doctrine of judicial estoppel.

The Petition continues Petitioner's quest to overturn a quiet title determination made by the bankruptcy court after a full evidentiary trial on the merits, now affirmed by two appellate courts. Notably, this dispute, along with numerous other related proceedings, controversies, motions and witnesses, was before the bankruptcy court over a ten-year period. Pet. App. at 17a-23a. Prior to trial of the title dispute, the bankruptcy court provided both parties with detailed and ample notice of the legal issues on which it would receive evidence as well as a roadmap of the legal framework for the trial. *Id.* at 22a-23a; 51a-56a.

At trial, Petitioner failed to present evidence sufficient to persuade the bankruptcy court as trier of fact that Petitioner held title to the disputed roadway because of a mutual mistake. *Id.* at 35a-39a. Based on the evidence presented, the bankruptcy court quieted title in Respondent. *Id.* at 40a.

B. Bankruptcy Court Reject's Application of Judicial Estoppel.

In its considered post-trial decision, the bankruptcy court expressly rejected the assertion that Petitioner did not need to present evidence of the alleged mutual mistake because it was entitled to have the doctrine of judicial estoppel applied against Respondent to meet its burden of proof. *Id.* at 35a-39a. Petitioner urged the application of

judicial estoppel based on a patchwork of purported admissions of counsel and statements from pleadings made and filed by Respondent much earlier in the case when Respondent argued for summary judgment based on a legal theory that subsequently was rejected on appeal. *See id.* at 21a, n. 10 (listing the purported prior inconsistent statements on which Petitioner sought to impose estoppel). The bankruptcy court rejected judicial estoppel because in its analysis: (1) the statements and assertions did not rise to the level of admissions regarding the specific issue asserted by Petitioner, *id.*; (2) the statements considered in their proper context did not relate to the same issue that was before the court at trial, *id.* at 21a-22a; and (3) the statements, even if admissions, were made in pursuit of a legal theory based on alternative facts that was overturned on appeal. *Id.* at 36a. In short, based on the facts in the record, the court before which this matter was pending for ten years, and which conducted a trial on the merits, did not perceive a threat to judicial integrity from any of the evidence or arguments presented by Respondent. *See id.*

C. The Ninth Circuit's Ruling on Judicial Estoppel.

The Ninth Circuit ultimately affirmed the decision of the bankruptcy court, and, on the specific facts of this case, found no abuse of discretion in the bankruptcy court's rejection of the doctrine of judicial estoppel. *Id.* at 3a. The Ninth Circuit did not enunciate a *per se* rule. It did not preclude a trial court from examining facts in a different case where a risk of inconsistent court determinations or an unfair advantage would undermine judicial integrity.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any court of appeals. Accordingly, Petitioner has not carried its burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

A. The Ninth Circuit Is in Accord with this Court that there Is Flexibility in the Application of Judicial Estoppel.

Petitioner argues that the Ninth Circuit has adopted a rigid, *per se* rule that precludes application of the doctrine of judicial estoppel as a matter of law if the initial judicial acceptance of the allegedly inconsistent position is subsequently reversed on appeal or otherwise overturned. Pet. at 2, 11. The Petition is remarkably lacking, however, in citation to Ninth Circuit authority to support this proposition; and, rather, refers more frequently to a 1989 opinion from the Sixth Circuit.[1]

The Memorandum Decision of the Ninth Circuit in this case, on the other hand (designated Not for Publication), points out that Respondent's private plat dedication theory was ultimately rejected on appeal; that Respondent gained no "unfair advantage" from advancing this argument; and that based on the facts presented there was no risk of inconsistent determinations. Pet. App. at 3a. The court of appeals then concluded that the bankruptcy court

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[1] *Coal Res., Inc. v. Gulf & W. Indus., Inc.*, 865 F.2d 761 (6th Cir. 1989). This decision pre-dates *New Hampshire v. Maine*, 532 U.S. 742 (2001), by more than twelve years, and therefore is of questionable relevance to whether there *currently* is a split among the circuits.

did not abuse its discretion in declining to apply the doctrine of judicial estoppel against Respondent. *Id.*

One of the two Ninth Circuit cases cited in the section of the Memorandum Decision discussing judicial estoppel (the only other case cited being *New Hampshire v. Maine*, *supra*) was *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001).[2] In *Hamilton*, a debtor received a discharge in bankruptcy court based on a schedule that inaccurately listed his assets. Thereafter, on motion of the trustee, the bankruptcy was dismissed and the discharge vacated. Subsequent to that, the former debtor filed suit seeking to recover on a claim that should have been listed on the schedule of assets. The defendant moved for summary judgment arguing that the claimant was judicially estopped from pursuing the claim *even though* the discharge by the bankruptcy court had been vacated. The motion was granted, and on appeal, the Ninth Circuit affirmed, stating, "[t]his court has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the parties previous inconsistent position." 270 F.3d at 783 (citations omitted). The *Hamilton* court then noted, under the circumstances presented by that case:

> Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may "accept" the debtor's assertions by relying on the debtor's non-disclosure of potential claims in many other ways.

Id. at 784 (citation omitted).

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[2] A case, it will be seen, rather conspicuously *not* cited in the Petition.

Thus, even though the debtor's discharge in *Hamilton* was later vacated, the Ninth Circuit had sufficient flexibility to apply judicial estoppel to foreclose his subsequent claim. The doctrine of judicial estoppel in the Ninth Circuit, therefore, is neither rigid nor *per se* as Petitioner suggests with respect to the "judicial acceptance" factor.

B. There Is No Conflict Among the Circuits as Suggested by Petitioner.

Two cases are cited by Petitioner, one from the Seventh Circuit and another from the Eighth Circuit, in support of the argument that the Federal Courts of Appeal are "sharply split" on this issue. Pet. at 2, 9-10. As it turns out, the first case dealt with a "novel issue," and apparently is *sui generis*; and the second implies a flexibility in the application of judicial estoppel that the Ninth Circuit in *Hamilton v. State Farm Fire & Cas. Co., supra,* specifically approved. Neither case presents a "sharp split" among the circuits that must be resolved by this Court.

In the first case cited by Petitioner, *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), a settlement class was stipulated to by the parties and approved by the court, and judgment was entered accordingly that also enjoined other class actions then pending against the defendants. On appeal, the settlement was disapproved and the case remanded back to the district court for further proceedings. Thereafter, the defendants argued that the putative class was unmanageable and should not be certified. *Id.* at 659. After the class was certified over defendants' objection, an appeal was taken. The court of appeals, noting that, "[t]hese are novel issues whose prompt resolution is important to the development

of the law of class actions as well as the resolution of the present case," *id.* at 658, approved use of judicial estoppel to preclude defendants' argument opposing class certification even though it previously had reversed the district court's approval of the settlement class. *Id.* at 660. In doing so, it was important to the appellate court that " . . . the defendants benefited from the temporary approval of the settlement, which they used to enjoin other . . . litigation against them. . . ." *Id.*

It appears that *Carnegie* is the only time the Seventh Circuit has addressed the "novel issues" presented there. In *Crosby v. Bowater Inc. Ret. Plan for Salaried Emples. of Great N. Paper, Inc.*, No. 05-C3478, 206 U.S. Dist. LEXIS 67144 (N. D. Ill. Sept. 1, 2006), a district court in that circuit discussed and explained the decision in *Carnegie* as follows:

> To be sure, on one (and seemingly only one) occasion, the Seventh Circuit has also explained that a scenario in which a litigant prevailed on a position in the district court, and that position was subsequently repudiated by the court of appeals, still potentially could ground a basis for the application of judicial estoppel.
>
> * * *
>
> The Seventh Circuit in *Carnegie* stressed the fact that the parties to be estopped there "reaped a benefit" from the position they asserted in the prior litigation; thus, judicial estoppel was equitably applied because "they cannot now be permitted to seek a further benefit from reversing their position." *Carnegie*, 376 F.3d at 660. Precedent stresses the importance of this "benefit" to the judicial estoppel analysis.

Id. at *23, *26.

As to the second case relied on, Petitioner judiciously introduces *Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006), with the signal, "*see also.*" Pet. at 2. In *Stallings*, the Eighth Circuit implied, but did not hold, that a debtor may be judicially estopped from pursing a subsequent claim that was not scheduled as an asset even though the bankruptcy discharge is later vacated. Specifically as to *Stallings*, Petitioner argued as follows in the Petition:

> The Eighth Circuit's decision in *Stallings v. Hussmann Corp.* follows a similar approach to that taken by the Seventh Circuit in *Carnegie. Stallings* held that a bankruptcy court's original discharge of a debt – when based on information provided by the debtor – constitutes sufficient acceptance of the debtor's position to provide a basis for judicial estoppel, even if the bankruptcy court "thereafter vacates and dismisses the debtor's bankruptcy after learning that the debtor was concealing claims." 447 F.3d at 1048 (citation omitted).

Pet. at 10.

The "(citation omitted)" from *Stallings* at the end of the foregoing quote in the Petition is somewhat disingenuous because the *Stallings* court cited to, and quoted from, *Hamilton v. State Fire & Cas. Co., supra,* for this proposition. In *Hamilton*, the Ninth Circuit flexibly applied the doctrine of judicial estoppel to preclude a debtor's subsequent suit when the claim had not been scheduled as an asset *even though* the discharge was later vacated and the bankruptcy dismissed. 270 F.3d at 784. Thus, Petitioner here is quoting from an Eighth Circuit decision that

implies an application of the judicial estoppel doctrine which Petitioner contends is contrary to the rule in the Ninth Circuit; and a Ninth Circuit case, the citation to which is conveniently omitted, is relied on by the Eighth Circuit as having actually applied judicial estoppel in that very fashion.

There is no split, sharp or otherwise, among the circuits as Petitioner suggests, and Petitioner's argument – particularly in its reliance on *Stallings* while "omitting" the citation to *Hamilton* – is, again, somewhat disingenuous (and misleading).

C. Petitioner's Argument on the Merits Is Unavailing.

Petitioner finally argues that, despite judicial estoppel being a discretionary equitable doctrine, the Ninth Circuit's decision in this case is both "clearly" and "plainly incorrect." Pet. at 12. Apparently, Petitioner is suggesting – without actually saying – that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10. More likely, in light of the total lack of support for any such contention, Petitioner is merely suggesting, albeit with righteous indignation, that the Ninth Circuit misapplied the properly stated rule of law with respect to judicial estoppel (given that the Seventh, Eighth and Ninth Circuits are in harmony in that regard). If so, such an argument rarely presents a basis on which this Court will grant certiorari, *id.*, and it should not here.

The bankruptcy court explained in painstaking detail in its August 22, 2003 decision after trial on the merits

why this was not a proper case for application of judicial estoppel. Pet. App. at 21a-23a, 35a-36a. In fact, the bankruptcy court concluded that Respondent's complaint did not even embrace a "mutual mistake" theory, *id.* at 36a, thus agreeing with Respondent that Petitioner has mischaracterized Respondent's prior position. Implicit in these findings was a conclusion by the bankruptcy court that the alternative theory pursued at trial by Respondent in this complex, commercial dispute, with fair notice to Petitioner and express approval of the court, did not threaten judicial integrity. Exercising its discretion, the bankruptcy court, after full analysis, declined to apply judicial estoppel on the facts of this case. That decision was affirmed by the district court and the Ninth Circuit. There is no basis or reason for this Court to review that outcome.

CONCLUSION

Petitioner has not established a compelling reason for this Court to grant a writ of certiorari. Therefore, Respondent requests that the Petition be denied.

Respectfully submitted,

MICHAEL K. KENNEDY
Counsel of Record
WM. CHARLES THOMSON
GALLAGHER & KENNEDY, P.A.
2575 E. Camelback Rd.
Phoenix, AZ 85016-9225
(602) 530-8000

STEVEN N. BERGER
ENGELMAN BERGER, P.C.
One Columbus Plaza,
Suite 700
3636 N. Central Ave.
Phoenix, AZ 85012-1936
(602) 271-9090

Counsel for Respondent

JUNE 2007

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No. 06-1380

FILED
JUN 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

ESTATE OF ELLA M. PARKER,

Petitioner,

v.

SEDONA GOLF RESORT, L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

CHARLES HULTSTRAND
Charles Hultstrand P.C.
1811 S. Alma School Road, Suite 245
Mesa, AZ 85201
(480) 222-0009

MICHAEL S. PAISNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

As we demonstrated in the petition, this Court's review of the Ninth Circuit's rigid holding that judicial estoppel is *per se* unavailable when a court accepts a party's prior inconsistent position in a decision that thereafter is reversed on appeal is warranted because that holding (i) deepens a circuit split on this issue (Pet. 9-12) and (ii) is clearly incorrect, reflecting a conception of the purposes of the judicial acceptance requirement that undervalues the importance of protecting the integrity of the judicial process (Pet. 12-19; see also *New Hampshire* v. *Maine*, 532 U.S. 742, 749-750 (2001)).

Respondent's brief in opposition is notable for what it does not contest: that it would be inconsistent with the purposes of the judicial estoppel doctrine—and particularly with the preeminent purpose of protecting the integrity of the judicial process—to refuse to apply that doctrine merely because a court decision adopting the prior inconsistent position was reversed on appeal. See Pet. 14-16.[1] That implicit concession is crucial because the arguments that respondent does advance for denying the petition—that the Ninth Circuit did not establish a *per se* rule in this case and that there is no circuit conflict on the question presented—rely on tortured interpretations of judicial opinions that actually are quite unambiguous in establishing the contrary. Assuming that courts say what they mean and mean what they say, this Court should reject respondent's attempt to conjure away the circuit split and should grant the petition.

1. Respondent's assertion that the Ninth Circuit did not establish a *per se* rule in this case can be dispensed with

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[1] See also Brief in Opp. 4 n.1 (asserting that *Coal Resources, Inc.* v. *Gulf & Western Industries, Inc.*, 865 F.2d 761 (6th Cir. 1989), which precluded the invocation of judicial estoppel if the judgment adopting the prior inconsistent position was reversed on appeal, is "of questionable relevance" in light of *New Hampshire*).

quickly. In its decision, the Ninth Circuit stated plainly that "[w]hen a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no 'risk of inconsistent court determinations.'" Pet. App. 3a (citing *New Edge Network, Inc.* v. *F.C.C.*, 461 F.3d 1105, 1114 (9th Cir. 2006) (quoting *New Hampshire*, 532 U.S. at 751)). It is hard to imagine how the Ninth Circuit could have spoken more unequivocally.

This Court established in *New Hampshire* that the "risk of inconsistent court determinations" is the touchstone for a finding of judicial acceptance. 532 U.S. at 750-751 (internal quotation marks omitted); cf. *New Edge Network*, 461 F.3d at 1114 (holding there to be "no risk of inconsistent court determinations" *because* court "did not adopt [prior] position" (internal quotation marks omitted)). Thus, the Ninth Circuit clearly upheld the bankruptcy court's refusal to invoke judicial estoppel on the sole ground that a finding of judicial acceptance was precluded by the district court's intervening rejection of the bankruptcy court's initial grant of summary judgment, in which the bankruptcy court had adopted the prior inconsistent position on mutual mistake.[2] There is no support in the Ninth Circuit's decision for respondent's wishful characterization of that ruling as simply "point[ing] out"

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[2] Immediately prior to establishing the *per se* rule precluding a finding of judicial acceptance if there had been reversal of the decision accepting the prior inconsistent argument, the Ninth Circuit observed that "[respondent] gained no 'unfair advantage' from [initially] advancing the position that the Rodriguez deed of trust resulted from mutual mistake * * * *because*" the initial grant of summary judgment had been reversed. Pet. App. 3a (internal citation omitted, emphasis added). Under any natural reading of the decision, this determination was not arrived at independently but rather through application of the *per se* rule enumerated thereafter. In any event, this language reinforces the inescapable conclusion that the court erroneously viewed the fact of reversal to be determinative of the judicial estoppel analysis.

that "based on the facts presented there was no risk of inconsistent determinations." Br. in Opp. 4. Indeed, one searches the Ninth Circuit's judicial estoppel analysis in vain for *any* discussion of the "facts presented" in the case.

Respondent is, of course, correct that the Ninth Circuit "concluded that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel." Br. in Opp. 4-5. But what is relevant for the purposes of this petition is *why* the Ninth Circuit determined that there had been no abuse of discretion. As the opinion demonstrates, the sole ground for that determination was the application of a *per se* rule of law.

2. Respondent next asserts that *Hamilton* v. *State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001), demonstrates that "[t]he doctrine of judicial estoppel in the Ninth Circuit * * * is neither rigid nor *per se* as petitioner suggests with respect to the 'judicial acceptance' factor." Br. in Opp. 6. In *Hamilton*, which addressed the situation of a debtor who attempted to bring claims that he had knowingly failed to disclose during his bankruptcy discharge proceedings, the Ninth Circuit held that "a discharge of debt by a bankruptcy court * * * is sufficient acceptance to provide a basis for judicial estoppel" of later pursuit of those claims, "even if the discharge is later vacated." 270 F.3d at 784. Respondent's position constitutes an over-reading of *Hamilton* for two reasons.

First, contrary to respondent's suggestion, Br. in Opp. 5-6, the Ninth Circuit did not rely on *Hamilton* as establishing a rule of "flexibility to apply judicial estoppel" in the circumstances of this case. Instead, *Hamilton* was cited solely as a source for the quotation "unfair advantage." Pet. App. 3a.

Second, *Hamilton* was decided in the specific context of a bankruptcy court's discharge of debt—a consideration that amply explains the Ninth Circuit's apparent determination that *Hamilton* did not control the present case. Such a discharge implicates special concerns of fairness to the court

and creditors that are not necessarily relevant in other contexts. Indeed, the *Hamilton* court justified its invocation of judicial estoppel in part by pointing to considerations that are unique to the specific context of a debt discharge in bankruptcy. See *Hamilton*, 270 F.3d at 785 ("In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process. The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets."). Thus, the *Hamilton* court's particularized concerns with the "integrity of the bankruptcy process" in the context of a discharge of debt led it to adopt a broad reading of the "judicial acceptance" factor *in that specific context*.

Of course, the Ninth Circuit could have applied broadly the principles established in *Hamilton* and extended the rule established therein to the context of this case—a bankruptcy court decision accepting a factual assertion in the course of an adversary proceeding. Indeed, petitioner's position is that the Ninth Circuit *should* have done just that and that cases such as *Hamilton*, and the Eighth Circuit's similar holding in *Stallings* v. *Hussman Corp.*, 447 F.3d 1041 (8th Cir. 2006), are relevant precedents bearing on the merits of the question presented for review in this petition. See Pet. 2, 10-11. But the Ninth Circuit declined to adopt that approach, and instead applied a *per se* rule.

3. Even if the approach taken by the Ninth Circuit in *Hamilton* and the *per se* rule adopted in the present case were somehow in tension, the circuit conflict presented by this case could not be resolved by the Ninth Circuit's reconciliation of those precedents. As we noted in the petition (at 2, 9, 11), established precedent in the Sixth Circuit also precludes the invocation of judicial estoppel if the judgment adopting the prior inconsistent position has been reversed on appeal. See *Coal Res.*, 865 F.2d at 773. Respondent dismisses *Coal Resources* as "of questionable relevance" because it "predates *New Hampshire* * * * by more than twelve years." Br.

in Opp. 4 n.1. But the case remains the law in the Sixth Circuit, and thus exerts an ongoing impact on the expectations of litigants. Moreover, although this Court's analysis in *New Hampshire* provides important guidance on the appropriate overall approach that courts should adopt in defining "judicial acceptance" (see Pet. 12-13), *New Hampshire* neither addressed specifically the question raised by this petition nor enumerated any relevant principles that were not already established at the time that *Coal Resources* was decided. Therefore, there is no guarantee that the Sixth Circuit would decide the issue presented in *Coal Resources* any differently today, absent further specific guidance from this Court.

4. Respondent's contention that the Seventh Circuit's decision in *Carnegie* v. *Household International, Inc.* stands for something other than what it says—that "reversal need not affect the application of judicial estoppel" (376 F.3d 656, 660 (7th Cir. 2004) (Posner, *J.*))—is also unavailing. Respondent's attempt to rewrite the decision is premised solely on the contention that it "dealt with a 'novel issue[],' and apparently is *sui generis*." Br. in Opp. 6 (quoting *Carnegie*, 376 F.3d at 658). But, that *Carnegie* dealt with a "novel" issue—"the bearing of the doctrine of judicial estoppel on class action litigation"—has no relevance to whether the rule enumerated therein, which does not even address that specific issue, applies generally. *Carnegie*, 376 F.3d at 658. In fact, the discussion in *Carnegie* of the effect of reversal on the applicability of judicial estoppel was in no way limited to the class action context. Furthermore, in addition to enumerating a general rule, the Seventh Circuit also engaged in an extended discussion of the principles underlying that rule—a discussion that, again, made no reference to any specific context. See *id.* at 660; Pet. 10-11.[3]

[3] Respondent's representation that "it was important to the appellate court that '* * * the defendants benefited from the temporary approval of the settlement, which they used to enjoin other * * * litigation against them* * *'" (Br. in Opp. 7 (quoting *Carnegie*,

That *Carnegie* is the only case in which the Seventh Circuit clearly has held that "reversal need not affect the application of judicial estoppel" (see Br. in Opp. 7) is also irrelevant. Respondent cites no Seventh Circuit case that purports to cast doubt upon, or even to limit, that holding—only a district court decision that confirms petitioner's interpretation of the rule established therein. See *ibid.* (quoting *Crosby* v. *Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 2006 U.S. Dist. LEXIS 67144, at *23 (N.D. Ill. Sept. 1, 2006)).

5. Finally, respondent misinterprets petitioner's contention that the Ninth Circuit decision in this case was clearly incorrect. Br. in Opp. 9 (citing Pet. 12). Petitioner's point is not that "the Ninth Circuit misapplied the properly stated rule of law with respect to judicial estoppel" (*ibid.*), but rather that it applied a rule of law—that "[w]hen a party advances a position that is ultimately rejected on appeal, that party may advance an alternative theory in future proceedings with no risk of inconsistent court determinations," Pet. App. 3a (internal quotation marks omitted)—that was improper. Moreover, respondent's vague defense of the analysis conducted by the bankruptcy court and the district court is largely beside the point, since the petition provides ample basis for this Court to conclude that the Ninth Circuit's analysis of the judicial estoppel issue could have come out in petitioner's favor had the court applied the correct rule of law. Pet. 17-19.

* * * * *

F.3d at 660)) is a curious way to characterize an observation that the *Carnegie* court introduced with "[a]nyway" (*Carnegie*, F.3d at 660). In any event, the argument that respondent did not benefit from its switch in position—or, more to the point here, that the switch was detrimental to petitioner—is one that respondent should advance in the Ninth Circuit on remand. As we demonstrated in the petition, the record here provides ample support for the proposition that there was a detriment to petitioner. Pet. 17-19.

Although this Court's judicial estoppel holdings have been couched in the language of discretion, the circuits understandably have interpreted *New Hampshire* and its progeny (see, e.g., *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999)) as establishing that the acceptance of an initial position by a court or agency is a prerequisite to the application of judicial estoppel. See, e.g., *Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 782 (3d Cir. 2001) ("Guided by *Cleveland*, we hold that it does not constitute bad faith to assert contrary positions in different proceedings when the initial claim was never accepted or adopted by a court or agency."). Therefore, it is incumbent on this Court to ensure that the standard is applied properly. A sharp divergence has emerged between (at least) the Ninth Circuit and the Seventh and Sixth Circuits as to whether judicial estoppel is available when a court accepts a party's prior inconsistent position in a decision that thereafter is reversed on appeal. Further review by this Court is essential to resolve this conflict on an important and recurring issue and to correct the erroneous position adopted by the Ninth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES HULTSTRAND
Charles Hultstrand P.C.
1811 S. Alma School Road, Suite 245
Mesa, AZ 85201
(480) 222-0009

MICHAEL S. PAISNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Counsel of Record
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

JUNE 2007